

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

TENABO MINING AND SMELTING COM-
PANY, a Corporation,

Appellant,

vs.

CHARLES D. BATES,

Appellee.

VOLUME I.

(Pages 1 to 272, Inclusive.)

Upon Appeal from the United States District Court
for the District of Nevada.

Filed

AUG 24 1914

F. D. Monckton,

Clerk.

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the Circuit Court of the United States, District of
Nevada, Ninth Judicial Circuit.*

IN EQUITY.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING AND SMELTING COM-
PANY, a Corporation,

Defendant.

Bill of Complaint [Filed October 2, 1911].

To the Honorable Judges of the Circuit Court of the
United States for the Ninth Judicial Circuit,
District of Nevada:

Charles D. Bates, in behalf of himself and all other stockholders of the defendant Tenabo Mining and Smelting Company, who are similarly situated and who wish to join in this bill and bear their proportion of the expenses of this suit and become parties thereto, brings this, his bill of complaint, against the above-named defendant, and for cause of complaint your orator says:

I.

That he is a resident and citizen of the State of Utah, residing at Salt Lake City, in said State; that the defendant Tenabo Mining and Smelting Company, a corporation, is a corporation organized and existing under and pursuant to the laws of the State of Nevada, and is a resident and citizen of said State.

II.

Your orator says that he is now and has been since

the incorporation of the defendant company, a *bona fide* stockholder thereof, owning and holding two hundred shares of its capital stock.

III.

Your orator further says that the subject matter of this suit is of a cash value exceeding two thousand dollars and that this suit is not a collusive one to confer on this court jurisdiction of a case of which it would not otherwise have cognizance. [1*]

IV.

Your orator further says that the defendant was incorporated under the laws of the State of Nevada, on November 14, 1908, for the purpose of acquiring, owning and operating mining claims and mining property, and conducting a general mining business, with a capital stock of three million dollars, divided into one million five hundred thousand shares, of the par value of two dollars each, of which said amount three hundred thousand shares were issued to the Tenabo Consolidated Mines Company and four hundred and fifty thousand shares were issued to the Gem Consolidated Mining Company in payment of the purchase price of the mining claims hereinafter mentioned, and seven hundred and fifty thousand shares were placed in the treasury of the said company as treasury stock thereof.

V.

That immediately after the incorporation of the defendant company and in consideration of the transfer to it of three hundred thousand shares of the capital stock of the defendant company, the Tenabo

*Page number appearing at foot of page of original certified Record.

Consolidated Mines Company conveyed to the defendant the following mining claims, to wit: Two Widows, Two Widows Extension, Copper Hill Group and Nevada Phoenix; and in consideration of the transfer to it as above stated of four hundred and fifty thousand shares of the defendant company, the Gem Consolidated Mining Company transferred to the defendant the mining claims known as Little Gem, Ollie, Reno, and Winnemucca; all of which said mining claims are located in Lander County, Nevada. That at the time of the transfer of the said property from the Gem Consolidated Mining Company the same were incumbered with a mortgage of fifteen thousand dollars.

VI.

That during November and December, 1908, and during the year 1909, the defendant company caused to be sold and disposed of from the treasury of said company, about three hundred thousand shares of its treasury stock, the exact amount thereof being to your orator unknown, for the sum of about twenty-seven thousand dollars, the exact amount of which said sum is to your orator likewise unknown; that the only source of income which the defendant has had has been from the sale of its treasury stock, the [2] said mining claims being undeveloped property and yielding no income whatsoever.

VII.

That in the year 1908, by reason of the failure of the defendant company to pay the mortgage due and owing as hereinabove set forth, the same was foreclosed, but before the sale of the said property under

said foreclosure proceedings, sufficient funds were realized from the sale of treasury stock with which to pay the said mortgage and the accrued interest and expenses thereof, which aggregated approximately twenty thousand dollars, the exact amount being to your orator unknown.

VIII.

Your orator is informed and believes, and therefore alleges the fact to be, that for more than two years last past, the defendant has had no income whatsoever. That it has been totally without funds. That on December 13th, 1910, it was obliged to borrow fifteen hundred dollars from one W. H. Sherman, with which to pay for the assessment work upon the said mining claims, and that to secure the payment of the said money so borrowed, it executed a mortgage to the said Sherman upon all its property and assets, which said mortgage, as your orator is informed and believes, is now due and unpaid; that all the money realized from the sale of the capital stock of the defendant company has been expended in the payment of obligations which were just and due, together with the payment of certain fees and allowances to the officers and board of directors of the defendant company.

IX.

That owing to the undeveloped condition of the property of the defendant and the incumbrance thereon, and the impecunious condition of the defendant, the four hundred and fifty thousand shares of treasury stock yet remaining with the company has no market value and nothing can be realized

thereon; that the assessment work for 1911 has not yet been performed and the defendant company has no money with which to pay for the same. That there are many obligations now due and owing from the defendant company to various creditors, and the defendant is in imminent danger of [3] having instituted a multiplicity of suits against it, and its property and assets dissipated. That the officers and agents of the defendant company have acknowledged openly and repeatedly that it is insolvent. Your orator is informed and believes that said mortgage is about to be foreclosed upon said property, in which event, all of the assets of the said defendant company would be sold for the payment thereof and the unsecured creditors left without resource for the payment of their claims. That the defendant is insolvent.

X.

Your orator further says that the defendant company has never been a going concern in any proper sense thereof, as defined and specified in its articles of incorporation. That from the beginning, the only business that it has transacted was to do the necessary assessment work upon its mining prospects for the years 1909 and 1910, and to attempt to sell its treasury stock and make application of the proceeds therefrom.

XI.

Your orator further says that the present board of directors or those whom they represent by proxy or other appointment hold a majority of the capital stock of the defendant company and have so held said

control since the incorporation thereof. That the affairs of said company have been grossly mismanaged in the following particulars, to wit: That beginning two months after the incorporation of the defendant company, it contracted to and did pay as long as it had funds, to its board of directors and certain other officers and agents, a stipulated monthly salary, notwithstanding the fact that said board of directors and officers and agents performed little or no service for the said defendant company; that in the sale of said three hundred thousand shares of treasury stock, or thereabouts, it paid grossly inadequate commissions either to those who were then upon the board of directors or to others who held large and controlling stock interests in said company; that in making on March 15th, 1910, with one Pepton B. Locker and with one John Janney, the former of whom was a heavy stockholder and the latter of whom was the Secretary of the defendant company, a contract for the sale of all the treasury stock of the defendant company upon a basis that promised to yield to the company no return [4] whatsoever; that in making no provision for the payment of the mortgage now due and owing upon the said property; for making no provision whatsoever for the payment of any of the just obligations due and owing by the defendant, and in keeping no adequate books of account showing the financial transactions of the defendant company.

X.

Your orator further says that owing to the insolvency of the company and the mismanagement

thereof, he has no plain, speedy and adequate remedy at law.

IN CONSIDERATION WHEREOF, and as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant, if it can, show why your orator should not have the relief herein prayed, and make a full disclosure and discovery of all the matters aforesaid according to the best and utmost of its knowledge, information and belief, full, true, correct and perfect answer make to all the matters herein stated and charged, but not under oath, answer under oath being hereby expressly waived, your orator prays:

1. That a receiver be appointed by this Court to take charge of all of the assets of said corporation located within the State of Nevada, including all books, records, papers and documents of every name, nature and description, and sell and dispose of all the property and assets of the said defendant company under the guidance and direction of this Court, and wind up the affairs of the company, and from the proceeds derived from the sale thereof, pay the expenses of said receivership, including a reasonable allowance as solicitors' fees for the bringing of this complaint, and distribute the balance to the stockholders of the defendant as their interests may appear.

2. Your orator further prays for such other and further relief in the premises as may be just and agreeable to equity.

MAY IT PLEASE YOUR HONORS to grant to your orators a writ of subpoena to be directed to the

said defendant Tenabo Mining and Smelting Company, commanding it at a time certain, and under a penalty therein to be limited to personally appear before this Honorable Court, and then and there, full, true, direct and perfect answer make to all and singular the premises; to [5] state, perform and abide by such order, direction and decree as may be made against it in the premises, and shall seem meet and agreeable to equity;

And your orator will ever pray.

J. D. SKEEN,

Solicitor for Complainant.

SHANK & SMITH,

Of Counsel. [6]

State of Utah,

County of Salt Lake,—ss.

Charles D. Bates, being first duly sworn, deposes and says: I am the plaintiff herein. I have read the foregoing complaint, know the contents thereof, and the same is true; excepting that those matters alleged upon information and belief I believe them to be true.

CHARLES D. BATES.

Subscribed and sworn to before me this 30th day of September, 1911.

[Seal]

J. McFARLAND,

Notary Public.

My commission expires December 17, 1914.

[Indorsed]: No. 1183. In the Circuit Court of the United States, District of Nevada. Charles D. Bates, Complainant, vs. Tenabo Mining and Smelting Company, a corporation, Defendant. Bill in Equity.

Filed October 2, 1911. T. J. Edwards, Clerk. By
H. D. Edwards, Deputy. [7]

[Subpoena.]

District of Nevada,—ss.

The President of the United States of America,
to Tenabo Mining and Smelting Company, a
Corporation, Greeting:

You are hereby commanded that you personally
appear before the Judges of our Circuit Court of
the United States, Ninth Circuit, District of Nevada,
at the courtroom of said court in Carson City,
Nevada, on the 6th day of November, 1911, to answer
unto a bill of complaint exhibited against you in said
court by Charles D. Bates; and to do further and re-
ceive whatever said court shall have considered in
that behalf; and this you are not to omit under the
penalty of Two Hundred and Fifty Dollars.

WITNESS the Honorable EDWARD D.
WHITE, Chief Justice of the United States, and
the seal of said Circuit Court hereunto affixed, at
Carson City, Nevada, this 2d day of October, 1911,
and of the year of our Independence the 136th.

[Seal]

Attest: T. J. EDWARDS,
Clerk.

By H. D. Edwards,
Deputy.

J. D. SKEEN,

Solicitor for Complainant.

SHANK & SMITH,

Of Counsel.

MEMORANDUM: The defendant is to enter its appearance in the above-mentioned suit, in the clerk's office at Carson City, Nevada, on or before the day at which the above subpoena is returnable, otherwise the bill may be taken *pro confesso*.

T. J. EDWARDS,

Clerk U. S. Circuit Court, District of Nevada.

By H. D. Edwards,

Deputy.

United States of America,

District of Nevada,—ss.

I hereby certify and return that I served the annexed Subpoena in Equity on the therein named Tenabo Mining and Smelting Co., a corporation, by handing to and leaving a true and correct copy thereof with George Brodigan, Secretary of State of the State of Nevada, personally, at Carson City, in said district, on the third day of October, 1911.

Marshal's fees: 1 service, \$4.00.

J. H. HUMPHREYS,

U. S. Marshal.

By R. D. Goode,

Deputy.

[Indorsed]: No. 1183. U. S. Circuit Court, District of Nevada. Charles D. Bates, vs. Tenabo Mining and Smelting Company, a corporation. Subpoena in Equity. Filed October 3, 1911. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [8]

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

IN EQUITY.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a
Corporation,

Defendant.

Answer to Original Bill of Complaint.

The answer of Tenabo Mining & Smelting Company, defendant, to the bill of complaint of Charles D. Bates, complainant:

This defendant now and at all times hereafter saving to itself all and all manner of benefit for advantage, exception or otherwise that can be made to, had or taken to the many errors, uncertainties, imperfections in said bill contained for answer thereto or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering,

1. Denies that this suit is not a collusive one to confer on said Court jurisdiction of an action of which it would not otherwise have cognizance of.

2. Admits that the defendant corporation was incorporated under the laws of the State of Nevada on November 14th, 1908, for the purposes, among others, of acquiring, owning and operating mining claims and mining properties, and conducting a general mining business, with a capital stock of three million

dollars divided into one million five hundred thousand shares of the par value of two dollars each, of which said amount three hundred thousand shares were issued to the Tenabo Consolidated Mines Company and four hundred and fifty thousand shares were issued to the Gem Consolidated Mining Company in payment for the purchase price of its mining claims. Admits that seven hundred and fifty thousand shares of the capital stock of said company were placed in the treasury of said company as treasury stock thereof, and this defendant states that the directors of said company were under the articles of incorporation and by-laws thereof, authorized to sell said treasury stock, or such portion thereof as in the discretion of said board of directors shall deem for the best interests of the corporation for the purpose of creating funds wherewith to transact the [9] business and business affairs of said corporation, and that 167,250 shares of said treasury stock is all of the same that has been sold and that the remaining portion thereof remains in the treasury of said corporation subject to sale.

3. Admits that immediately after the incorporation of said defendant company, the Tenabo Consolidated Mines Company, in consideration of the transfer to it of three hundred thousand shares of the capital stock of the defendant corporation conveyed to said defendant corporation all of its right, title and interest in and to the following named lode mining claims, situate in the Bullion Mining District, Lander County, Nevada, to wit: Two Widows, Two Widows Extension and Copper Hill, and also

all its right, title and interest in and to a certain bond and lease upon the Nevada Phoenix group of mining claims situate in the same mining district and the Gem Consolidated Mining Company, in consideration of four hundred and fifty thousand shares of the capital stock of the defendant corporation, transferred to the defendant corporation all of its right, title and interest in all of the Little Gem lode mining claim and also all of its right, title and interest in and to certain contracts and deeds in escrow for the acquisition of the location title to the Ollie, Reno and Winnemucca lode mining claims situated in the same mining district; but this defendant denies that at the time of said transfer any of said mining claims conveyed by said Gem Consolidated Mining Company other than the Little Gem were encumbered with a mortgage in the sum of fifteen thousand dollars or any other sum whatsoever, and further, this defendant states that in the month of October, 1907, the Reliance Mining & Milling Company, being then the owner of the location title to the said Little Gem lode mining claim, executed and delivered a mortgage upon said mining claim to McCornick & Co. of Salt Lake City, Utah, to secure the payment of a note in the sum of fifteen thousand dollars, executed by Reliance Mining & Milling Company as maker and payable to McCornick & Co. as payee; that thereafter the said Reliance Mining & Milling Company conveyed all of its right, title and interest in and to said mining claim to the Gem Consolidated Mining Company and that in the month of October, 1908, said promissory note not having been

paid, suit was instituted by McCornick & Co. in the Third Judicial District Court of the State [10] of Nevada in and for the County of Lander against the Reliance Mining & Milling Company to foreclose said mortgage and at the time of the transfer by said Gem Consolidated Mining Company of all of its right, title and interest in and to said Little Gem lode mining claim to said defendant corporation, said note had not been paid and said suit for the foreclosure of the mortgage given to secure the said note was then pending and undisposed of in the court in which it had been instituted and said transfer was made by said Gem Consolidated Mining Company and accepted by this defendant corporation subject to the lien of said mortgage.

4. This defendant admits that during the months of November and December, 1908, and during the year 1909 the defendant company caused to be sold and dispose of from the treasury of said company 167,250 shares of its capital stock; but denies that said company during said year or thereafter, or at all, sold and disposed of three hundred thousand shares of its treasury stock or any amount in excess of 167,250 shares, and this defendant admits that for the sale of said shares of treasury stock it realized the sum of \$26,687.50. This defendant admits that the only source of income which the defendant has had has been from the sale of its treasury stock, but denies that said mining claims are undeveloped property, but admits that up to the present time the same have yielded no income whatever, but this defendant states that prior to the time when the above de-

scribed mining claims were conveyed by the Tenabo Consolidated Mines Company and the Gem Consolidated Mining Company to this defendant much development work had been done upon the same and large deposits of milling ore had been developed thereon in, to wit: more than seventeen thousand tons of a net value in excess of \$171,000.00.

5. Denies that in the year 1908, or at any other time or at all, by reason of the failure of the defendant company to pay the mortgage due and owing as set forth in plaintiff's complaint, the same was foreclosed, but, on the contrary, this defendant states that the proceeding to foreclose said mortgage had been instituted and was pending at the time of the conveyance by the Gem Consolidated Mining Company of the Little Gem, Ollie, Reno and Winnemucca lode mining claims to this defendant corporation, but this defendant admits that before the sale of said property under said [11] foreclosure proceedings and before final hearing upon said proceedings sufficient funds were realized from the sale of treasury stock by said defendant corporation with which to pay the indebtedness secured by said mortgage and to procure a release of said mortgage, but this defendant denies that said indebtedness at the time of the payment thereof exceeded the sum of \$19,885.45.

6. This defendant admits that for more than two years last past said defendant has had no income whatever, but denies that it has been without funds. Admits that on December 13, 1910, it was obliged to and did borrow \$1,500.00 from one W. H. Shearman with which to pay for the annual assessment

labor performed upon the mining claims owned by it, and that to secure the payment of said money so borrowed it executed a mortgage to the said Shearman upon all of its property and assets except the Copper Hill group, and denies that said mortgage included said Copper Hill group of mining claims; admits that said mortgage is unpaid, but denies that the same is due, and on the contrary this defendant states that the time of the payment of said promissory note for which said mortgage was given as security has been extended by said Shearman, and this defendant states that its assets are of sufficient value to enable it to borrow sums of money far in excess of the amount due upon said promissory note, and in addition thereto all debts due and owing by said defendant with which to liquidate its present indebtedness. This defendant admits that all money realized by it from the sale of its capital stock has been expended in the payment of obligations which were just and due, together with the payment of certain and all fees and allowances to its officers and board of directors, but this defendant alleges that all of said fees and allowances were legal and just claims against said corporation.

7. This defendant denies that owing to the undeveloped condition of the property of the defendant, or to the encumbrances thereon, or to the impecunious condition of the defendant, or by reason of any other matter or thing whatsoever, the number of shares of stock now remaining in the treasury of said corporation has no market value, or that nothing can be realized thereon, but, on the contrary,

this defendant states that said treasury [12] stock is of a value in excess of fifty cents per share, and that said treasury stock and all of the same could have been sold by said defendant and would have been sold by it had it not been for the wrongful acts of this plaintiff as hereinafter alleged.

8. Defendant admits that the assessment labor for the year 1911 has not yet been performed and that the defendant company has no money in its treasury with which to pay the same; but this defendant alleges that it is now making arrangements to and will cause the annual assessment labor for the year 1911 to be commenced in the immediate future and performed as by law required, and that it can and will procure funds through the sale of its treasury stock, or by other legitimate means, wherewith to pay for and liquidate all expenses incurred in the performance of said labor.

9. This defendant denies that there are many or any obligation of said corporation now due and owing by it to various or any creditors, except this defendant states that there are obligations now contracted for which it is liable in the sum of about \$8,-297.75, and no more. This defendant denies that it is in imminent or any danger of having instituted a multiplicity or any suits against it or of having its property and assets or any of the same dissipated. Denies that its officers or agents, either with or without authority, acknowledged openly or repeatedly or at all that it was insolvent, and, on the contrary, this defendant alleges that it is not insolvent, and denies that said mortgage is about to be fore-

closed upon said property, and denies that in the event of such foreclosure all or any of the assets of said defendant corporation would be sold for the payment thereof or that the unsecured creditors would be left without recourse for the payment of their claims, but, on the contrary, this defendant alleges that it has sufficient assets with which to pay all of its liabilities, and this defendant denies that it is insolvent or in imminent or any danger of insolvency.

10. This defendant denies that it has never been a going concern in any proper sense thereof as defined and specified in its articles of incorporation, and, on the contrary, alleges that it has transacted such [13] business as it deemed proper and to the best interests of said corporation and its stockholders, and that any delay or interruption in the transaction of its business affairs has been caused through the wrongful acts of said plaintiff as hereinafter set forth, and this defendant denies that from its beginning the only business that it was transacting was to do the necessary assessment work upon its mining prospects for the years 1909 and 1910 and to attempt to sell its treasury stock and make application of the proceeds thereon, but, on the contrary, this defendant alleges that it has transacted all business which its board of directors deemed for the best interests of itself and its stockholders.

11. This defendant admits that the members of the present board of directors, together with those whom they represent as proxy for the purpose of voting

at the annual stockholders' meeting or adjournments thereof, hold a majority of the capital stock of the defendant company, but denies that they have held such control since the incorporation thereof or for any purpose except for the annual stockholders' meeting provided to be held in the year 1911 and the adjournments thereof. And this defendant denies that the affairs of said company, or any of the same, have been grossly or at all mismanaged, in that beginning two months after the incorporation of said company it contracted to and did pay so long as it had funds to its directors or certain other officers or agents a stipulated monthly salary, notwithstanding the fact that said board of directors, officers and agents performed little or no service for said defendant company, or in that in the sale of said 300,000 shares of the treasury stock as alleged in plaintiffs' complaint or any of the same, it paid grossly or any inadequate commissions either to those who were then upon the board of directors or to others who held large or controlling interests in said company, or in that in making on March 15, 1910, with one Peyton B. Locker or with one John Janney a contract for the sale of all of the treasury stock of said defendant company, or that in that making no provision for the payment of the mortgage alleged by said plaintiff to be due and owing upon said property, or in that having made no provision whatever for the payment of any of the just obligations due and owing by said defendant as alleged [14] in said plaintiff's complaint and not keeping adequate books of account showing the financial transactions of the

defendant company as alleged in plaintiff's complaint, but, on the contrary, this defendant states that all monthly salaries paid by it to its board of directors and other officers and agents were paid and received in pursuance of resolutions of its board of directors theretofore duly adopted at meetings thereof duly called and held, and that each and every of said payments were made for services actually performed by the parties to whom the same were paid; and denies that said payments or any of the same were made for little or no service performed by the parties to whom the same were paid; and this defendant further states that said payments and each of them were made by officers and directors of this corporation who have ceased to be such for more than one year last past, and none of the present officers or directors of said corporation participated either in the making of such payments or in the receipt thereof, except that the present board of directors have caused to be made a payment of \$200.00 to John Janney, the present Secretary of said corporation, to apply upon account for services performed by him as secretary of said corporation. And this defendant further states that all of its treasury stock heretofore sold has realized to this corporation in cash all that its said stock was reasonably worth to this corporation at the time of the contracting for the sale hereof, and that none of the parties selling any of the same have on behalf of this corporation received grossly or inadequate commissions for the sale thereof, and that none of said commissions were ever paid to members of its board of directors or

officers or to any other party or parties who held controlling stock interests in said company, or in any way dominated its business affairs or its board of directors.

12. This defendant further states that in the month of March, 1910, Peyton B. Locker was a stockholder in said defendant corporation to the amount of 61,618 shares and no more, so far as shown by the books of this defendant, and this defendant has no knowledge as to whether or not said Peyton B. Locker at said time owned any other or further shares of stock and therefore denies the same, and this defendant admits that the said John Janney was at the date of the execution of said contract by it to the said Peyton B. Locker, the secretary of said defendant, and admits that it entered into a contract with the said Peyton B. Locker in the [15] month of March, 1910, for the sale of certain of its treasury stock, but denies that said contract was for the sale of all its treasury stock or any amount thereof in excess of 450,000 shares, and denies that the sale of said treasury stock under said contract promised to yield to the company no returns whatever, but, on the contrary, defendant alleges that said contract, if performed according to its terms of necessity, would have furnished to said defendant the reasonable value of the stock which it contracted to sell, and this defendant states that said contract was in writing, a copy thereof being hereto attached, marked Exhibit I and made a part of this answer. This defendant admits that it has not procured funds wherewith to pay the promissory note secured by the mortgage

given to the said W. H. Shearman, but alleges that it has sufficient assets wherewith to procure funds with which to liquidate said indebtedness in the event it fails to sell sufficient of its treasury stock for that purpose before demand is made for the payment of said promissory note, and this defendant further states that had it not been for the wrongful acts of said plaintiff as hereinafter related, said defendant would have procured from the sale of its treasury stock a sum of money far in excess of that needed for the payment of said mortgage, as well also as for the payment of all other just obligations due and owing or to become due and owing by it, and this defendant denies that it has not kept adequate books of account showing the financial transactions of said defendant company, but, on the contrary this defendant states that it has kept all such books of account as its officers and directors deemed necessary and sufficient for the purpose of keeping informed as to its business transactions.

13. This defendant denies that owing to its insolvency as alleged in said plaintiff's complaint or of its mismanagement, or by reason of any other matter or thing whatsoever, plaintiff has no plain, speedy or adequate remedy at law.

14. And for further answer to plaintiff's complaint, this defendant states that on the 22d day of March, 1910, it entered into a contract in writing with Peyton B. Locker, otherwise known as P. B. Locker, a copy of which is attached to this answer as Exhibit 1; that immediately [16] thereafter the said P. B. Locker entered into an active campaign

for the purpose of selling the treasury stock of this defendant corporation under the provisions of said contract and diligently pursued performance under said contract down to the time when said plaintiff instituted proceedings in this court against this defendant corporation as hereinafter alleged, and in so doing expended large sums of money and procured parties who were able, ready and willing to pay to this corporation the sum of fifty cents per share net for more than 40,000 shares of its said treasury stock, and this defendant is informed and believes, and therefore alleges the fact to be, that said parties are still ready, able and willing to purchase large blocks of said treasury stock at said price when the sale of said stock can be made by this defendant without any question pending in the courts as to the right of said corporation to sell the same under the provisions of said contract Exhibit 1 hereto attached, or as to the solvency of said corporation.

15. That on the 29th day of May, 1911, this plaintiff filed in this court an action wherein he was complainant and this defendant corporation was defendant, a copy of which said complaint is hereto attached, marked Exhibit 2 and made a part of this answer; that said suit continued to pend in said court from the date of its filing to the second day of October, 1911, at which time an order was entered, dismissing said bill of complaint upon the application of said plaintiff; that said defendant believing that the issues presented by said complainant presented a question as to the right of this corporation to sell its treasury stock or any of the same under the

provisions of said contract between this defendant and said P. B. Locker, refused to sell any of its said treasury stock until the issues presented by said bill of complaint were disposed of and the parties procured by the said P. B. Locker under the provisions of his said contract who were able, ready and willing to purchase shares of stock before the filing of said complaint, refused to purchase any of the same until such time as the issues of said complaint were disposed of.

16. That immediately after dismissing said bill of complaint set forth in Exhibit 2 hereto attached, said plaintiff caused to be filed a [17] bill of complaint in this action now pending between plaintiff and defendant, and that by reason of the bringing and prosecution of said suits and not otherwise, this defendant has been unable to sell sufficient of its treasury stock with which to pay its present indebtedness, and this defendant further states that about the time of its incorporation it caused the workings in its said mining properties to be thoroughly examined by mining engineers and a report to be made by them as to the ore reserves and deposits contained in said properties and exposed by the workings thereon, to the end that it might adopt a policy in handling the ore deposits in said properties best calculated to further the interests of said corporation and its stockholders; that said mining engineers recommended that a mill or smelter be erected to treat and reduce the ores contained in said properties and that by so treating and reducing said ores the same could be done at a substantial profit to said

corporation, while said ores could not be shipped to a smelter and the costs and expenses of transportation paid without concentration or reduction at a profit, and upon investigation this defendant discovered that it had large and substantial deposits of ore developed from which substantial profits could be procured by treating and reducing the ores at the property and shipping the concentrates or matte therefrom, but that profit could not be procured from the shipment of said ores in their crude state, and thereupon it decided to sell sufficient of its treasury stock with which to create funds for the construction of a smelting plant or concentrating mill at or near its property for the reduction and treatment of the ores therein contained, and the said contract with the said P. B. Locker, a copy of which is attached to this answer, as Exhibit 1, was entered into by this defendant in an endeavor to sell sufficient of its treasury stock to create the necessary funds with which to construct such smelter or mill, and had it not been for the bringing and prosecution of said suits by said plaintiff as hereinabove set forth, said defendant would have sold sufficient of its treasury stock at the reasonable value thereof with which to have created funds for the construction of said smelter or mill, and this defendant is informed and believes, and therefore alleges the fact to be, that it could now and can in the immediate future sell sufficient of its treasury stock with which to [18] construct and operate a smelter or mill for the reduction of the ores in its said properties when its right under the provisions of said contract

with P. B. Locker to sell said treasury stock is no longer being litigated in court.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by said bill charged, without this, that there is any other matter, cause or thing in said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer to and not herein or hereby well and sufficiently answered, confessed, traversed, avoided or denied, is true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as *to* this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

TENABO MINING & SMELTING COM-
PANY.

[Seal]

By JOHN JANNEY,
Its Secretary.

H. C. EDWARDS,
Counsel for Defendant. [19]

**Exhibit 1 [to Answer—Agreement Dated March 22,
1910, Tenabo Mining & Smelting Co.—P. B.
Locker].**

THIS AGREEMENT made and executed this 22nd day of March, 1910, by and between Tenabo Mining & Smelting Company, a Nevada corporation, hereafter called the Company, and P. B. Locker of Salt Lake City, Utah, hereinafter called the Agent, witnesseth:

WHEREAS the Company has four hundred and fifty thousand shares of its capital stock remaining in its treasury with which to provide funds for the development and operation of its properties, and the erection of reduction plants, and,

WHEREAS said P. B. Locker is desirous of undertaking the sale of said stock and represents and believes that he can sell a portion of this stock in France or elsewhere, provided the necessary authority be given him to negotiate and execute a contract on behalf of the Company and to list the stock upon a French Banking Market, or other markets;

NOW THEREFORE for and in consideration of the mutual obligations herein imposed and the sum of one dollar interchangeably paid, the said P. B. Locker agrees and undertakes to provide and furnish all the fees and expenses for the listing of each one hundred fifty thousand shares of stock provided for in a Special Power of Attorney set forth in the Minutes of the Company, and all other expenses required by the law of France or elsewhere, and all trustee's fees and expense, and he further agrees at his own expense to go to Paris in the interests of this Company and use diligent effort to negotiate said contract.

In consideration thereof the Company hereby appoints said P. B. Locker its agent and attorney in fact under a special power of attorney hereinafter referred to dispose of four hundred fifty thousand shares of its capital stock now remaining in the treasury, and the Company agrees to duly authorize said P. B. Locker by special power of attorney to

make and execute on behalf of the Company a contract in terms and effect as set out in the said special power of attorney.

The company further agrees that should said P. B. Locker successfully negotiate said contract, it will pay to the said P. B. Locker for his services from the moneys realized from the sale of said stock, but not otherwise, all in excess of the sum of fifty cents per share, said compensation to said Locker being conditional not only upon the negotiation of said contract, but upon the receipt by the Company of the purchase price of said stock.

It is mutually agreed that the entire amount of money received from the sale of said stock shall be deposited to the credit of the Company upon the delivery of certificates of stock.

It is expressly understood and agreed that the Company shall in no way be liable for any fees or expenses for the listing of said stock, or trustee's fees and expenses, or any other expenses whatsoever, and that each and every share of stock so sold shall net the Company fifty cents per share.

From the first money received from the sale of stock, the Company shall pay the said Locker the first fifteen thousand dollars advanced to pay taxes and dues for listing the stock on the French market and the three thousand dollars fees to the Trust Company. The Company shall, however, be reimbursed said amounts from the moneys received from the sales in excess of said amounts before said Locker shall be entitled to any compensation, the intention being that each and every share of stock sold

shall net the company fifty cents per share. Should the sale of stock be not sufficient to net the company fifty cents per share, the said Locker agrees to reimburse the Company in stock out of his personal stock in an amount equal to the amount taken from the treasury and for which the Company has not received fifty cents net per share.

The time allowed said Locker for the carrying out of this contract shall be as follows:

Sixty days within which to furnish satisfactory proof that the Company has entered in contractual relations with reliable persons whereby the sum of \$15,000.00 will be furnished to the agent as needed for listing. Then ninety days to effect his negotiations in Paris or [20] elsewhere and procure the execution of a satisfactory contract as set out in said special power of attorney, provided that in computing these periods of time, the months of June, July and August shall be excepted because of the summer season.

Nothing in this contract shall be construed to require the agent to sell any of the said stock in France, but on the contrary he may negotiate the sale of the said stock at any other place or places desired by him.

IN TESTIMONY WHEREOF the Company has caused this contract to be signed by its president and its secretary and its corporate seal to be affixed hereto, and the party of the second part hereto sub-

scribes his signature this 22nd day of March, 1910.

TENABO MINING & SMELTING COM-
PANY.

By W. MONT FERRY,
President.
JOHN JANNEY,
Secretary.
P. B. LOCKER,
Agent. [21]

[**Bill of Complaint, Filed October 16, 1911.**]

*In the Circuit Court of the United States for the
Ninth Circuit, District of Nevada.*

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING AND SMELTING COM-
PANY, a Corporation,

Defendant.

To the Honorable Judges of the Circuit Court of the
United States in and for the Ninth Circuit, Dis-
trict of Nevada:

Charles D. Bates, a resident and citizen of the
State of Utah, in behalf of himself and all other
stockholders of the defendant Tenabo Mining and
Smelting Company similarly situated, who wish to
join in this bill, bear their proportion of the ex-
penses of this suit, and become parties hereto, brings
this, his bill of complaint against the above-named
defendant, and for cause of complaint your orator
says:

I.

That the complainant Charles D. Bates is a resident and citizen of the State of Utah and is residing at Salt Lake City, Salt Lake County, in said State. That the defendant is a corporation organized under and pursuant to the laws of the State of Nevada, and is a resident and citizen of said State, and complainant is an actual and *bona fide* stockholder of said defendant corporation.

II.

That on and prior to the 21st day of September, 1908, the Gem Consolidated Mining Company was a corporation organized and existing under the laws of the State of Delaware, and was the owner of the Little Gem, Ollie, Reno, and Winnemucca lode mining claims, located and situated in the Bullion Mining District, Lander County, State of Nevada. That said property was clear of all incumbrances, except the paramount title of the United States and a certain mortgage made, executed, and delivered by the said Gem Consolidated [22] Mining Company to one W. S. McCormick, of Salt Lake City, Utah, for the sum of \$15,000.00 and accrued interest: that the Little Gem claim had been developed by sinking a shaft or incline to a depth of about 400 feet, and a rich body of ore encountered, but the development of work had not proceeded far enough to ascertain the extent of the ore body. The other claims were undeveloped and of unknown value, except a prospective value by reason of their close proximity to the said Little Gem claim.

III.

That the Tenabo Consolidated Mines Company, a

corporation, was the owner of certain mining claims located in the Bullion Mining District, Lander County, Nevada, and in close proximity to the said claims owned by the Gem Consolidated Mining Company, said claims being known as the Two Widows, Two Widows Extension, the Copper Hill Group, and the Nevada Phoenix, none of which had been developed, and were of no known value, except such as they would have by reason of their being located in a district where valuable minerals were known to exist, and in a vicinity of the said Little Gem mining claim.

IV.

That one Hiram Tyree was president of the Gem Consolidated Mining Company, and was then and during all the times after the incorporation of said company had been, the controlling factor in the business of said corporation, naming its board of directors, and at all times requiring them to submit to his demands with respect to dealing with the property of the said corporation. That large blocks of stock had been sold, the money wasted and squandered, and the said Hiram Tyree had pledged the credit of the corporation for money which he converted to his own use and benefit, and by such continued mismanagement and fraud, all of the available assets of said corporation, including the treasury stock and its credit, had been dissipated and wasted, and the property was mortgaged for all that the said Hiram Tyree and the board of directors operating under him, were able to secure.

V.

That one Peyton B. Locker was the President of the said Tenabo [23] Consolidated Mines Company, and was in control of its board of directors; that no mineral of attractive values and quantities had been discovered, and the capital stock of said corporation could not be sold readily upon the market. That the said Hiram Tyree and Peyton B. Locker were both skillful and aggressive stock-brokers and promoters, and in the 21st day of September, 1908, they conspired together to deprive the said Gem Consolidated Mining Company and the said Tenabo Consolidated Mines Company of all of their available assets, for the purpose of securing unfair and fraudulent advantages to themselves and to create a large block of stock which could be sold upon the market to innocent and unsuspecting purchasers; and on that day, with such purposes in view, the said Hiram Tyree and the said Peyton B. Locker, entered into a contract in writing in words and figures as follows, to wit:

“This agreement made and entered into this 21st day of September, A. D. 1908, by and between Hiram Tyree, first party, and P. B. Locker, second party, witnesseth:

The said parties hereto, in consideration of the sum of One Dollar to each of them in hand paid by the other, receipt whereof is hereby acknowledged, mutually agree as follows:

Each of said parties agree that they will together immediately cause to be organized under the laws of the State of Nevada, a corporation to be known

as the Tenabo Mining & Smelting Company, or with such other name as may hereafter be agreed upon, with a capital stock of \$3,000.00 divided into 1,500,000 shares of the par value of \$2.00 each; said corporation to have a board of directors consisting of five members, and officers consisting of a president, vice-president, secretary and treasurer, with 800,000 shares of the capital stock remaining in the treasury as a working capital, and the other 700,000 shares of the capital stock to be divided as follows: 400,000 shares thereof to be issued to the Gem Consolidated Mining Company, a Delaware corporation, and 300,000 shares thereof to be issued to the Tenabo Consolidated Mines Company, a Nevada corporation; said articles of incorporation, it being understood, to contain the ordinary, usual, and customary provisions, and the said first party agrees immediately upon the organization of said corporation to use his best endeavors to cause to be conveyed to said corporation in consideration of said 400,000 shares of stock so delivered to said Gem Consolidated Mining Company the location to the Gem, Ollie, Reno, Winnemucca lode mining claims, situated in the Bullion Mining District, Lander County, Nevada, free and clear of all encumbrance, except a certain mortgage upon the Gem Claim held by W. S. McCornick for the sum of \$15,000 and interest, and the second party agrees immediately upon the organization of said corporation that he will use his best endeavors [24] to cause to be conveyed to said corporation in consideration of the 300,000 shares of stock so issued to the Tenabo Consolidated

Mines Company the location title to the Two Widows, Two Widows Extension and to that certain group of mining claims consisting of eight known as the Copper Hill Group, and all the right, title and interest of said Tenabo Consolidated Mines Company in and to a certain lease known as the Nevada Phoenix free and clear of encumbrances, all of said property being situated in said Bullion Mining District, County and State aforesaid.

It is mutually agreed between the parties hereto that in the event of the organization of said corporation that they will each use their best endeavors to to cause said corporation to give an option to W. J. Hilands for the sale of 600,000 shares of its treasury stock for 15 cents per share, and in the event such option is executed, then in the event the parties hereto or either of them procures a contract under said Hilands for the sale of said stock or any of the same that they will divide all commissions made by them equally, each of the parties hereto taking one-half thereof, but each party to bear his own expenses and all sums received as profits from the sale of said stock by either of the parties hereto either directly or indirectly shall be deposited at some bank in New York City to be hereafter agreed upon, and distributed equally by said bank.

It is further agreed that in the event of the organization of said corporation then the said first and second parties will add together all of the stock received by them from or through their respective companies and divide the same equally between themselves.

In Witness Whereof, the parties have hereunto set their hands the day and year first above written.

(Signed) HIRAM TYREE.

P. B. LOCKER.”

VI.

That the negotiations between the said Hiram Tyree and Peyton B. Locker were continued, and on the 14th day of November, 1908, they caused the defendant Tenabo Mining and Smelting Company to be incorporated under the laws of the State of Nevada as aforesaid, with a capital of \$3,000,000, divided into 1,500,000 shares of the par value of \$2.00 each, and with H. P. Clark, Lester D. Freed, R. T. Badger, C. S. Varian and H. C. Edwards as incorporators with 100 shares of stock each, and who constituted the board of directors of said corporation. That in the negotiations, it was agreed that the said Hiram Tyree should have the right to name three of said board and the said Peyton B. Locker should have the right to name two of said board, and accordingly, the said Hiram Tyree named R. T. Badger, C. S. Varian and H. C. Edwards, and the said Peyton B. Locker [25] named the said H. P. Clark and Lester D. Freed. That the said Hiram Tyree caused all of the assets of the said Gem Consolidated Mining Company hereinbefore described to be transferred to the said defendant, in consideration of 450,000 shares of its stock, which stock was to be issued in two certificates, one for 50,000 shares and one for 400,000 shares, and the said Peyton B. Locker caused the Tenabo Consolidated Mines Company to transfer all of its assets, consisting of the

mining claims hereinabove described, to the said Tenabo Mining and Smelting Company, in consideration of 300,000 shares of its stock. For the purpose of promoting the sale of the treasury stock of the defendant corporation, and pursuant to the fraudulent contracts and agreements between the said Hiram Tyree and the said Petton B. Locker, they caused the board of directors of the defendant corporation to prescribe as one of the conditions of taking over the property of the said two corporations, that all of the stock issued in consideration of the transfer of the property as aforesaid, which in equity belonged to the stockholders of the said Gem Consolidated Mining Company and the Tenabo Consolidated Mines Company, to be placed in escrow with the Carnegie Trust Company of New York City to be held until the 25th day of November, 1909.

VII.

That said board of directors organized by electing H. P. Clark, President, and R. T. Badger, Secretary and Treasurer, and thereafter and on the 6th day of January, 1909, they passed resolutions allowing each of themselves 2,500 shares of stock for services rendered as directors, and further provided that each of said directors should at any time before the 25th day of November, 1909, have the privilege of purchasing 5,000 shares of the stock at 15 cents per share, and thereafter, on the 7th day of January, 1909, said directors excepting only Lester D. Freed met and passed a resolution allowing the said H. P. Clark, H. C. Edwards and R. T. Badger, the sum of \$50.00 per month, as officers of said corporation, and

employing the said C. S. Varian as attorney at a monthly salary of \$50.00 per month, which, however, was not to include any retainers or any services rendered in the trial of any cases, and on said day, passed the [26] following resolutions, to wit:

“Be it resolved that the said Trust Company” (the Columbia Trust Company) “is hereby authorized to countersign when signed by the President or Vice-President and the Secretary or Assistant Secretary of this Company, an original issue of the capital stock to the number of 1,500,000 shares of the par value of two dollars each.

Be it further resolved that the said Trust Company may apply to and act upon instructions of C. S. Varian, counsel of this corporation, in respect to any legal questions arising in connection with said agency.

Be it further resolved that the Secretary be, and is hereby, instructed to file with the Columbia Trust Company, a certified copy of the foregoing resolution.”

“Whereas, negotiations have been pending with brokers of New York City and Boston wherein it appears that a sale of 600,000 shares of the treasury stock of this corporation can be made: and

Whereas, it is the opinion of this board of directors that it is to the best interests of this corporation to grant an option for the sale of 600,000 shares of the treasury stock of this corporation, to P. B. Locker, of Salt Lake City, Utah, with full power to assign to others that he may desire;

Now, therefore, be it resolved that this corpora-

tion do grant an option to the said P. B. Locker or assigns, to purchase 600,000 shares of the treasury stock of this corporation at the price of fifteen cents per share for the first four hundred thousand shares, and twenty cents per share, for the remaining two hundred thousand shares, making a total of one hundred thousand dollars for six hundred thousand shares of the treasury stock, payable as follows:

The sum of \$20,000.00 to be paid to this corporation on or before the 10th day of April, 1909, and the further sum of \$5,000.00 on the first days of the months of May and June of said year, and the sum of \$10,000.00 per month on the first days of July, August and September, and \$20,000 per month on the first days of October and November, 1909, making the full sum of \$100,000. Said contract to provide that time is the essence of the same, and in the event said Locker or his assigns fail to make any of said payments as therein provided, then said option will immediately cease and terminate, and the said Locker, or his assigns, to lose all rights to purchase said stock under the provisions of said option, provided, however, that the said Locker, nor his assigns, nor either of them, shall incur any indebtedness or liability of any kind against the company or its property, provided, however, the board may extend time of payments if it so desires, and the President and Secretary of this corporation are authorized and directed to execute immediately, on behalf of this corporation, such contract as will carry this resolution into full

force and effect, the said contract to provide that the said Locker [27] or his assigns, is to cause a market to be made upon the curb of New York and elsewhere as may seem best, giving market quotations of the stock of this corporation, and said contract to provide further that the stock books of this corporation shall be assigned by the President and Secretary and forwarded to the Carnegie Trust Company of New York City, with instructions to deliver treasury stock to the order of said Locker or his assigns, in such amounts as may be called for, upon the payment to the said Carnegie Trust Company of the sum of fifteen cents per share for the first four hundred thousand shares and twenty cents per share for the last two hundred thousand shares of the six hundred thousand shares covered by this option, the same to be placed to the credit of this corporation for its use and benefit."

VIII.

Pursuant to the arrangements theretofore made, the said Hiram Tyree negotiated a loan or sale, the details of which are unknown to your orator, whereby he secured from the sale of 100,000 shares, or on the loan secured by 100,000 shares of the capital stock of defendant corporation, the sum of \$35,000.00, and by a series of resolutions which he caused said board of directors to pass, he secured 165,000 shares of said stock for the sum of \$25,000.00, retaining for his own individual use and benefit the sum of \$10,000.00 in money and 65,000 shares of said stock, as compensation for negotiating said transaction. That the said sum of \$25,-

000.00 was paid into the Utah National Bank of Salt Lake City, Utah, of which Bank one W. S. McCornick was President and the Director R. T. Badger was cashier. That such proceedings were had that suit was brought in the District Court for Lander County, Nevada, by the said Director H. C. Edwards, acting as attorney for W. S. McCornick, to whom the said Hiram Tyree was indebted in a large sum of money, to foreclose the mortgage upon the said Little Gem, Ollie, Winnemucca and Reno Claims, and said board of Directors, acting under influence and control of said Hiram Tyree, and for their own advantage and gain, in disregard of the rights of the stockholders of said corporation, paid out the following sums of money, to wit:

P. B. Locker—Equity in sale of 2,250		
shares.....	\$1,350.00
Taxes 1908—	\$152.32	
1909—	81.15	233.47

General Expenses:

C. S. Varian, Telegrams,		
etc.....	\$ 15.55	
V. M. Ramee, Book.....	3.75	
McCornick & Co. Rec.		
Deeds.....	6.65	[28]
Utah Litho Co. Certificates.	187.50	
Bank of Austin Rec. Deeds	1.00	
Bert Acree, Rec. Deeds..	38.45	

42 *Tenabo Mining and Smelting Company*

Windsor Trust Company		
telegrams.....	2.45	
Ut. Nat. Bank, Telegrams, etc.....	14.29	269.64
<hr/>		
Legal Fees and Salaries:		
C. S. Price.....	\$50.00	
H. C. Edwards.....	1,025.45	
C. S. Varian.....	800.00	
R. T. Badger.....	650.00	
H. P. Clark.....	550.00	
Lester D. Freed.....	550.00	
McCornick & Co. lien fees.	75.00	3,700.45
<hr/>		
Property:		
McCornick & Co. Note....	\$15,000.00	
" " " Interest	3,868.00	18,860.00
Assessment Work:		
George Weston..	1001.55	
C. S. Price.....	110.30	1,111.85
New York Registrar and		
Transfer Fees.....		448.60
Balance in Utah National Bank.....		713.49
<hr/>		
Total.....		\$26,687.50

The said Peyton B. Locker sold 2,250 shares of stock of the said corporation and received \$1,687.50: that he paid to said corporation, the whole of said sum, and the said board of directors repaid to him as commissions for the sale of said stock, the sum of \$1,350.00.

IX.

Your orator is informed and believes, and therefore alleges, that the said Hiram Tyree and the said

Peyton B. Locker and John Janney, the partner of the said Peyton B. Locker, disagreed and quarreled as to the division of the commissions and moneys drawn for the sale of stock, and the said board of directors after paying themselves, as above set forth, out of the moneys received from the sale of said stock, resigned, and on the 5th day of February, 1910, a new board of directors, each holding 100 shares of stock of defendant corporation, and consisting of W. Mont Ferry, Benner X. Smith, E. O. Howard, John Pingree, and John Janney, were elected by the board of directors to fill the vacancies in the board. That said new board qualified and passed a resolution allowing themselves \$50.00 per month as compensation for their services as directors, and also employing the firm of Stephens, Smith and Porter to act as attorneys for said corporation. That afterwards, said board paid themselves in accordance [29] with the resolution allowing themselves compensation as such directors.

X.

That said Peyton B. Locker and John Janney evolved a scheme for the sale of 450,000 shares of the treasury stock of said corporation, through a system of trustees, registrars, assistant secretaries, and numerous vice-presidents, which scheme was presented to said board of directors, which was at all times agreeable to said Peyton B. Locker and John Janney, and on the 5th day of March, 1910, at meetings of the board of directors held that day, the following resolutions were passed:

“Whereas, this corporation has no funds with which to carry on its development work, to erect the necessary mills and equipment with which to economically treat and handle its ores, and in general to carry on its business: and

Whereas, Mr. Duncan MacVichie, in his report, estimates that a development fund of \$20,000 to \$25,000 will block out 100,000 tons of ore in the Gem mine, one of the properties belonging to this corporation, which ore is now estimates to have an average of \$18.00 per ton; and

Whereas, Mr. MacVichie estimates that \$25,000 will supply a one hundred ton daily capacity mill, and that \$30,000 will supply a matting plant; and

Whereas, it would appear that \$100,000 or thereabouts expended on the Gem mine would put that property on dividend paying basis, and that other money can be spent to advantage is developing the other properties belonging to this company which seem to possess great prospective merit; and

Whereas, there is remaining in the treasury of this corporation, 580,750 shares of stock, 169,250 shares having been sold at the price of fifteen cents per share net to the company; and

Whereas, P. B. Locker has negotiations under way with French Bankers, appearing to promise a practical plan for the sale of the stock of this corporation; and

Whereas, P. B. Locker has offered to undertake the securing of a contract to net the company fifty cents per share for 450,000 shares of stock, or \$225,000.00;

Now, therefore, Be it resolved that this company enter into, and that the President and Secretary be and they are hereby authorized and instructed to execute, a contract with the said P. B. Locker in terms and figures following, to wit:

‘AGREEMENT:

This agreement, made and executed this — day of March, 1910, by and between Tenabo Mining and Smelting Company, a Nevada Corporation, hereinafter called the Company, and P. B. Locker, of Salt Lake City, Utah, hereinafter called the Agent, Witnesseth:

Whereas, the Company has 450,000 shares of its capital stock remaining in its treasury, with which to provide funds for the development and operation of its properties and the erection of reduction plants; and

Whereas, said P. B. Locker is desirous of undertaking a sale of said stock and represents and believes he can sell a portion of this stock in France or elsewhere, provided the necessary authority be given him to negotiate and execute a contract on behalf of the company, and to list the stock upon the French Banking Market, or other markets;

Now, Therefore, for and in consideration of the mutual obligations herein imposed and the sum of one dollar interchangeable paid, said P. B. Locker agrees and undertakes to provide and furnish all the fees and expenses for the listing of each 150,000 shares of stock, provided for in a special power of attorney set forth in the minutes of the company, and all other expenses required by the laws of

France or elsewhere, and all trustees' [30] fees and expenses, and he further agrees at his own expense, to go to Paris in the interests of this company and use diligent efforts to negotiate said contract.

In consideration thereof, the Company hereby appoints said P. B. Locker, its agent and attorney in fact, under a special power of attorney hereinafter referred to, to dispose of 450,000 shares of its capital stock now remaining in the treasury, and the company agrees to duly authorize said P. B. Locker by special power of attorney, to make and execute on behalf of the company, a contract in terms and effect as set out in the said special power of attorney.

The company further agrees that should said P. B. Locker successfully negotiate said contract, it will pay to the said P. B. Locker for his services, from the money realized from the sale of said stock but not otherwise, all in excess of the sum of fifty cents per share, said compensation to said Locker being conditional not only upon the negotiation of said contract, but upon the receipt by the company of the purchase price of said stock.

It is mutually agreed that the entire amount of money received from the sale of said stock shall be deposited to the credit of the company upon the delivery of certificates of stock.

It is expressly understood and agreed that the company shall in no way be liable for any fees or expenses for the listing of said stock or trustees' fees and expenses, or any other expenses whatsoever, and that each and every share of stock so sold shall net the company, fifty cents per share.

From the first money received from the sale of stock, the company shall pay the said Locker, the first \$15,000.00, advanced to pay taxes and dues for listing the stock on the French Market, and the \$3,000.00 fees to the Trust Company. The company shall, however, be reimbursed said amounts from the money received from the sales in excess of said amounts, before said Locker shall be entitled to any compensation, the intention being that each and every share of stock sold, shall net the company fifty cents per share. Should the sale of stock be not sufficient to net the company fifty cents per share, the said Locker agrees to reimburse the company in stock out of his personal stock in an amount equal to the amount taken from the treasury, and for which the company has not received fifty cents net per share.

The time allowed said Locker for the carrying out of this contract, shall be as follows;

Sixty days within which to furnish satisfactory proofs to the company that he has entered into contractual relations with reliable persons whereby the sum of \$15,000.00 will be furnished to the agent as needed for listing. Within ninety days, to effect his negotiations in Paris or elsewhere, and procure the execution of satisfactory contract as set out in said special power of attorney, provided that in computing these periods of time, the months of June, July and August shall be excepted, because of the summer season.

Nothing in this contract shall be construed to require the agent to sell any of the said stock in

France, but on the contrary, he may negotiate the sale of the said stock at any other place or places desired by him.

In Testimony Whereof, the company has caused this contract to be signed by its President and its Secretary, and its corporate seal to be affixed hereto, and the party of the second part hereto subscribes his signature, this — day of March, 1910.

TENABO MINING AND SMELTING COMPANY.

By _____,
President.

_____,
Secretary.

_____,
Agent.' [31]

Whereas, P. B. Locker, has been in negotiations with certain parties in Paris, France, looking to the sale of treasury stock in this corporation and believes that the sale of treasury stock can be effected there through negotiations recently opened up by him; and

Whereas, it appears advisable that this corporation, by the sale of its treasury stock, secure funds for the installation of needed equipment and reduction works, and for the further development of its properties, as well as for carrying on its business affairs in general.

Now, Therefore, be it resolved, that the said P. B. Locker have conferred upon him, authority to execute a contract as hereinafter set out, and that the President and Secretary of this corporation be, and they are hereby, authorized and instructed for and

on behalf of this company, to execute and deliver to the said P. B. Locker, a special power of attorney for the purpose of authorizing him to execute such a contract as follows, namely:

‘SPECIAL POWER OF ATTORNEY.

Know All Men By These Presents: That the Tenabo Mining and Smelting Company has made, constituted, and appointed, and by these presents does make, constitute and appoint, Peyton B. Locker, its true and lawful attorney, for this corporation and in its name, place and stead, and for its use and benefit, to execute and deliver a contract in words and figures substantially as follows, to wit:

Between the undersigned, the Tenabo Mining and Smelting Company, a corporation organized under the laws of the State of Nevada, United States of America, with a capital stock of three million dollars, the principal place of business of which is at Salt Lake City in the State of Utah, United States of America. By Mr. Peyton B. Locker, attorney in fact of said company, acting under the powers vested in him by a certain power of attorney authorized and executed in accordance with a resolution of the board of directors of said company adopted at a special meeting held on the 5th day of March, 1910, hereinafter called the vendor, of the one part and ———, hereinafter called the bankers, of the other part, it has been arranged and agreed as follows:

The Tenabo Mining and Smelting Company, being desirous of placing 450,000 shares of its capital stock in Europe, of a nominal value of two dollars, and the Bankers, after having examined the papers of the

said company and the reports of the engineers, agree to lend their support, and the following arrangements have been made between the parties:

Article One: The Vendor agrees to apply through the bankers, to the Ministers of Finances, and to the Administration for the Registration of Property and Stamp in Paris for the compound duty on the shares, and to furnish all necessary documents required by the laws of the French Republic. It further agrees to supply all documents necessary for the publication prescribed by the laws in the Official Journal of the French Republic. It furthermore agrees to abide by the formalities for obtaining the admission of the shares upon the French Banking Market. The bankers on the other hand, bind themselves to give all their assistance in respect of these various formalities so they may be accomplished in the shortest possible time.

Article Two: The cost in respect of application for compound duty on the shares and for deposit in respect to annual taxes to the Administration of Registration of Property and Stamp, as also the compound duty on complaint stamping, and further the cost of publication in the official journal for obtaining the free circulation of the said shares in France, together with the expenses attached to the quotation of the shares and cost of printing the same to bearer, as also all cost of advertising in the daily press of Paris and the provinces, or in other financial papers and generally the cost of issuing, are all together reckoned to amount to a minimum sum of \$45,000.00. This amount and any expenses exceeding that

amount, the vendor does not agree to supply or pay, and the vendor is not nor shall it be in any way liable therefor, but the same shall be subject to arrangement and agreement between the said Peyton B. Locker, personally, and not as attorney in fact, and the said bankers.

Article Three: The vendor hereby gives to the bankers, an option for three months after the necessary documents have been handed over, to authorize the placing of shares, to place 150,000 shares of its capital stock, of [32] the par value of \$2.00 each, at a price of 6.25 francs per share.

In consideration of said option, said bankers further agree and firmly bind themselves, that they will within said three months, purchase from said vendor, one-half of the said 150,000 shares, being 75,000 shares, and pay vendor for the same within said three months, at the price of 6.25 francs per share.

In the event of said bankers having at the expiration of said three months, placed and paid for the whole of said 150,000 shares, the vendor hereby gives to the bankers, a further option for six months after the expiration of said three months, to place a further block of 150,000 shares of said stock at the price of 6.25 francs per share.

In consideration thereof, the said bankers agree that should they exercise this second option they will pay to the vendor for all of said stock they may place, the price of 6.25 francs per share, and they further agree and firmly bind themselves that should they exercise this second option, they will within six months purchase from said vendor, one-half of said

150,000 shares, being 75,000 shares of this second option, and pay vendor for the same, within said six months, at the price of 6.25 francs per share.

In the event of said bankers having at the expiration of said six months placed and paid for the whole of said 150,000 shares, the vendor hereby gives to the bankers, a further option for three months after the expiration of said six months, to place a further block of 150,000 shares of said stock at the price of 6.25 franc per share.

In consideration whereof, the said bankers agree that should they exercise this third option, they will pay to the vendor for all of said stock that they may place, the price of 6.25 francs per share, and they further agree and firmly bind themselves that should they exercise this third option, they will within three months purchase from said vendor, one-half of said 150,000 shares, being 75,000 shares of this third option, and pay to the vendor for the same within said three months, at the price of 6.25 francs per share.

Article Four. The shares shall be delivered by a trustee and shall represent nominative certificates deposited by the company in the hands of the said Trustee. The shares so delivered shall be to bearer under the seal of the company, with coupons attached and jointly signed by the duly authorized officers of the company and the trustee. The said 150,000 shares to be first delivered, shall be in the following denominations.

20,000 certificates to bearer of five shares each, 5,000 certificates to bearer of ten shares each, and this shall also apply to further blocks of shares so

far as same has not been altered, if required by mutual consent of the parties.

A specimen of the shares shall be supplied by the bankers.

Article Five: The bankers bind themselves to obtain as soon as possible, a quotation of the said shares on the French Bank Market, nevertheless, the sale of the shares by the bankers may commence before the necessary formalities in respect of said quotations have been fulfilled.

Article Six: The vendor agrees and binds itself to have the said shares listed on the New York curb exchange.

Article Seven: The trust certificates to bearer shall be lodged by the vendor in a Parisian Bank to be nominated by the vendor, which shall hold same at the disposal of the bankers against payment.

Article Eight: The vendor agrees not to issue certificates to bearer for a larger quantity than that of 450,000 shares above mentioned, but as the vendor shall still hold a further 130,000 capital shares for disposal, they give by these presents to the bankers a preference right thereto, if the said vendor decided at any time to place the same, being the said 130,000 shares or part thereof in Europe.

Article Nine: The vendor binds itself to establish an office of this company at the Bankers' Banking House, for giving information, and shall pay an annual rent of frs. 5000, provided, however, no rental shall be charged by the bankers unless and until they have paid for the first 150,000 shares under this contract, upon which payment the vendor binds itself

to pay the said five thousand francs, annually for a period of three years, and upon payment by the bankers, for each succeeding 150,000 shares, the vendor binds itself to pay said five thousand francs for an [33] additional period of three years, provided further, that the bankers shall hold the said office properly furnished, lighted and heated, and shall without charge, furnish one English speaking clerk to attend especially to the business of the vendors.

Article Ten: It is hereby agreed that the dividend coupons shall be payable in Paris without any deduction for commission or discount, except legal taxes, and the bankers are hereby appointed as financial agents for the payment of the said dividends, and shall be allowed a commission of francs five per francs one thousand paid in coupons of the company.

If, however, the bankers deem it necessary to transfer the payment of the coupons to another bank, then they shall give the latter the said francs five in respect of each frs., one thousand paid in dividends.

All dispute arising under these presents shall be referred to the Tribunal of Commerce of La Seine, which is hereby declared to be alone competent to deal with the same.

Made in duplicate in French and English, in Paris, this — day of —, 1910.

TENABO MINING AND SMELTING COMPANY,

Vendor.

By _____,

Attorney in Fact.'

Given and granted unto the said attorney, full power and authority to do and perform all acts and things whatsoever requisite and necessary to be done **in and about the premises**, as fully to all intents and purposes as it might or could do if personally present, hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, this corporation causes these presents to be signed by its president and its Secretary, and its corporate seal to be affixed hereto, this — day of March, 1910.

TENABO MINING AND SMELTING COMPANY,

By _____,
President.
_____,
Secretary."

(Acknowledgment.)

XI.

That the said Peyton B. Locker and John Janney expended large sums of money in securing stock certificates, in paying assistant secretaries, vice-presidents, attorneys, and in securing the influence of men of high standing financially, politically, and socially, and secured favorable consideration from the Franco-American Banque of Paris, France, and have succeeded, as your orator is informed and believes, in placing the said 450,000 shares of the capital stock of this corporation upon the market in France, paying therefore a tax of \$10,000.00 to the French Government, and incurring other indebtedness in estab-

lishing an office and securing the service of agents and representatives.

XII.

That the extensions of time for the performance of the conditions of said contract by the said Peyton B. Locker were made from time to time, and on the 6th day of February, 1911, the following proceedings were had at a regular meeting of the said board of directors of defendant [34] corporation:

“Whereas, large sums of money are being expended by P. B. Locker, in the work of financing the treasury of this company by the sale of treasury stock in Paris, France, \$4,368.57 being the Windsor Trust Company bill for printing French bearer certificates, of which \$2,000.00 has been paid; \$1,310. 00, \$610.00, \$410.00, bills for services of Vice-presidents and Assistant Secretaries in signing 45,000 certificates; French taxes and dues approximating \$10,000.00, Trustee Fee to Windsor Trust Company \$3,000.00; also attorneys fees for legal advice in Paris, and sundry other incidental expenses: and

Whereas, this Company is not paying any part of these expenses but is receiving the benefit therefrom and is therefore, interested in the success of negotiations which require expenditures of large sums of money on the part of said P. B. Locker, and

Whereas, said Locker has advised this company that he can secure a loan from a French Bank upon his note, provided he can secure the issue of 50,000 shares in French bearer certificates, and has asked for a loan of the same, offering to secure this company by 70,000 shares of stock of this company which

is owned by him and associates;

Now, therefore, be it resolved that this company loan to the said P. B. Locker, 50,000 shares in French bearer certificates for a period of six months, upon the deposit by the said P. B. Locker with the Windsor Trust Company, to the credit of the Tenabo Mining & Smelting Company, as collateral security, of 70,000 shares of stock of this, the Tenabo Mining and Smelting Company, upon the condition that the consent of the loan of said 50,000 shares in French bearer certificates be obtained from Mr. Bernard Desouches, 148 Avenue Malakoff, Paris, France, and also from the members of the Underwriting Syndicate, with whom this company has contracts relating to the said stock; and

Resolved, that this company authorizes the payment of \$25,000.00 to the order of P. B. Locker from the money deposited in the Franco-Americaine Banque to the credit of this company, from the sale of the first allotment of 150,000 shares of stock, not however, until the entire allotment of 150,000 shares aforesaid, has been paid for in full, and upon condition that the said P. B. Locker deposited with the said Franco-Americaine Banque, 50,000 shares of stock of this company as represented by five thousand French bearer certificates of the denomination of ten shares each, heretofore loaned to the said P. B. Locker by the Tenabo Mining and Smelting Company, for the purpose of providing funds for expenses and so forth.

Resolved that the Franco-Americaine Banque be, and the same is hereby, authorized and instructed to

turn over to the order of P. B. Locker, of the Hotel Chatham, Paris, France, and Mr. Bernard Desouches, party of the second part in a contract authorized by resolution adopted March 5th, 1910, five thousand French Bearer certificates of the denomination of ten shares each, upon the deposit by the said P. B. Locker with the Franco-Americaine Bank, or with the Windsor Trust Company of New York, or part with one and part with the other, a total number of shares which will aggregate 70,000, said shares to be deposited to the order of the Tenabo Mining and Smelting Company."

XIII.

That after the expenditure of the money as hereinabove set out, on the 13th day of December, 1910, said directors passed a resolution authorizing the President and Secretary to execute a mortgage on all of said property to W. H. Sherman, of Salt Lake City, Utah, for \$1,500.00, and to give the said W. H. Sherman one thousand shares of stock for making said loan to said corporation, and thereafter said mortgage was executed and said stock delivered, and is now a subsisting liability of said corporation.

XIV.

Your orator is informed and believes that the said Peyton B. Locker is [35] financially irresponsible, and the said board of directors by said resolution has pledged the corporate assets, without consideration, for the personal use and benefit of the said Peyton B. Locker, and have permitted him to appropriate \$25,000.00 of the money due or to become due said corporation, and have contributed to

the perpetuation of fraud upon innocent purchasers of said stock, by authorizing and permitting the said Peyton B. Locker and his numerous agents and representatives to represent that he was selling the treasury stock of said corporation, when, in truth and in fact, he would be selling his own individual holdings, to the injury of the credit of the corporation. Your orator further says that all moneys received, except the money paid to W. S. McCornick on said mortgage, the nature and consideration of which is unknown to your orator, has been paid to the present and the former directors as compensation for services alleged to have been rendered and to the said Hiram Tyree and P. B. Locker as unconscionable and fraudulent commissions, and otherwise misappropriated and squandered; that the Little Gem mine has filled with water and no development work has been done, and said corporation is now insolvent and bankrupt, and all of the property mortgaged for purposes other than the development of said mine.

XV.

Your orator further says that a regular stockholders' meeting was called for the 13th day of February, 1911, for the election of a board of directors. That said Hiram Tyree, caused proceedings to be instituted in the District Court for Salt Lake County, State of Utah, to enjoin the voting of the stock issued to a trustee to in turn to be issued to prospective purchasers in France, which proceeding caused the continuance of said meeting to the 13th day of May, 1911. That at said meeting the Tyree interests

claiming to have control disregarded the ordinary rules of procedure and elected a board of directors of said corporation, and your orator is informed and believes that said board is now assuming to act as the legal representatives of said corporation. That other stockholders disregarded the proceedings of the said Tyree interests, and likewise elected a board of directors, four of whom succeeded themselves and and assuming to act as the legal representatives of said corporation. [36]

XVI.

That a bitter contest is being waged by the conflicting interests of said corporation, and in view of the numerous fraudulent acts, the misappropriation of funds, the extensive and fraudulent promotion schemes by the said Peyton B. Locker and the said Hiram Tyree, and their numerous agents and representatives, the assets consisting of the said mining property located in Nevada, are jeopardized and will be wasted, squandered and lost to the stockholders of the defendant corporation, unless the Court enjoins the further selling of stock in the defendant corporation, and by a receiver, takes possession of all of said property; and complainant has no plain, speedy and adequate remedy at law.

In consideration whereof, and inasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief herein prayed, and make a full disclosure and discovery of all of the matters aforesaid, according to the best and utmost of its memory, knowledge, in-

formation, and belief, full, true, direct, and perfect answer make to all the matters herein stated and charged, but not under oath, answer under oath being hereby expressly waived your orator prays:

1. That the defendant be required to appear and show cause at a time certain, why it should not be enjoined and restrained from selling, agreeing to sell, giving options to sell, or causing to be sold, and from permitting any of its officers, agents, trustees, or representatives to sell, transfer, or agree to sell, in the United States, France, or elsewhere, any of its treasury stock or any of its capital stock not outstanding; and in the meantime, and until the said orator can be heard, that defendant, its officers, agents, trustees and representatives, be temporarily enjoined from doing, or permitting to be done, any of said acts.

2. That defendant be required to appear and show cause, if it has any, why a receiver should not be appointed by this Court, to take charge of all of the assets of said corporation located within the State of Nevada, and particularly all mining property and claims owned, claimed or controlled by said corporation, located in the county of Lander, State of Nevada, or elsewhere in said State. [37]

3. That said receiver be authorized and directed to cause ancillary receivers to be appointed in States other than the State of Nevada, to sue for and recover all moneys and property lost or misappropriated by the directors or officers of said corporation.

4. That all of the assets of such corporation be sold and converted into money, and after payment

of the costs and expenses of this proceeding, including counsel fees, that said assets be distributed among the creditors and the surplus, if any, be distributed *pro rata* among the stockholders of defendant corporation.

5. That to enable the Court to make a just distribution of said assets among the persons entitled thereto, that the Court cause proper notice to be given to all creditors and stockholders having claims against said corporation or stock therein, and if claims or stock should be in dispute, that the same be established by the judgment of competent tribunals.

6. And your orator further prays for himself and for all others similarly situated, for such other and further relief as the Court may deem meet and proper.

May it please your Honors to grant your orator a writ of subpoena of the United States of America, directed to the said defendant, the Tenabo Mining and Smelting Company and such others as shall, in the discretion of your Honors, be necessary for the hearing and determination of this cause, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such orders and decrees in the premises as the Court shall deem proper and required by the principles of equity and good conscience.

J. D. SKEEN,

Solicitor and Complainant.

J. D. SKEEN,

Of Counsel for Complainant. [38]

State of Utah,
County of Salt Lake,—ss.

J. D. Skeen, being first duly sworn, upon oath deposes and says: That he is solicitor for the complainant above named. That he has made an examination of the books and records of the defendant Tenabo Mining and Smelting Company, and has conversed with the officers and agents of said corporation respecting the conduct of its affairs, and is better informed with respect to said things than the complainant above named, and for that reason makes verification of this bill.

That he has read the foregoing bill, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

J. D. SKEEN.

Subscribed and sworn to before me, this 27th day of May, 1911.

[Seal] CLARENCE CRAMER,
Notary Public in and for Salt Lake County, State of Utah.

My commission expires Jan. 10th, 1912.

[Indorsed]: No. 1164. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Charles D. Bates, Complainant, vs. Tenabo Mining and Smelting Company, a corporation, Defendant. Bill of Complaint. Filed May 29th, 1911. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.

[Indorsed]: No. 1183. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Charles D. Bates vs. Tenabo Mining & Smelting

Company. Answer to Bill of Complaint. J. D. Skeen, Atty. for Plaintiff. H. C. Edwards, Atty. for Defendant. Filed October 16, 1911. T. J. Edwards, Clerk. [39]

*In the Circuit Court of the United States, District
of Nevada, Ninth Judicial Circuit.*

No. 1183.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a
Corporation,

Defendant.

Replication.

The replication of the above-named plaintiff to the answer of the above-named defendant.

This replicant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto saith that he does and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, tra-

versed or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humble as in and by said bill he has already prayed.

J. D. SKEEN,
Solicitor for Complainant.

SHANK & SMITH,
Of Counsel.

[Indorsed]: No. 1183. In the Circuit Court of the United States, District of Nevada, Ninth Judicial Circuit. Charles D. Bates, Complainant, v. Tenabo Mining & Smelting Company, a Corporation, Defendant. Replication. J. D. Skeen, Solicitor for Complainant, Kearns Building, Salt Lake City, Utah. Shank & Smith, of Counsel, 1002 Alaska Building, Seattle, Wash. Filed November 29, 1911. T. J. Edwards, Clerk. [40]

In the District Court of the United States, in and for the District of Nevada.

No. 1183—IN EQUITY.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a
Corporation,

Defendant.

Decree.

This cause came on regularly to be heard and was argued by counsel for the respective parties, and

upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED:

I.

That J. P. Raine, of Pine Valley, State of Nevada, be and he is hereby appointed receiver of the Tenabo Mining & Smelting Company, defendant herein, a corporation organized under and pursuant to the laws of the State of Nevada, and said receiver is hereby authorized and directed forthwith to take possession of all of the real and personal property of said corporation located within the State of Nevada, including all books, papers and documents of every name, nature and description, and particularly the following mining claims: Little Gem, Ollie, Reno, Winnemucca, Two Widows, Two Widows Extension, Copper Hill Group and Nevada Phoenix, together with all machinery, tools, appliances and other personal property located upon or used in connection with said mining claims, all of which said property is located in Lander County, State of Nevada.

II.

To examine, or cause the books and records of the defendant Tenabo Mining & Smelting Company to be examined, and from said books and from such other sources of information as may be available, to ascertain:

(a) The authorized capitalization of said corporation, the number of shares issued and outstanding on the first day of October, 1912, and the number of shares in the treasury of said corporation on said date; also whether or not stock has been issued and sold by the officers and agents of said corporation

since said date, and if so, to whom and for what consideration.

(b) To ascertain from said books and otherwise the money on hand [41] on the 1st day of October, 1912, if any, and the nature and amount of the indebtedness of said corporation, to whom and when payable, and whether in money or in stock of said corporation, also whether or not any indebtedness has been incurred by the officers and agents of said corporation since the 1st day of October, 1912; and if so, the nature, amount and consideration of said indebtedness.

III.

To sell for cash at public sale all of the real and personal property of said corporation, and particularly the following mining claims located in Lander County, State of Nevada, to wit: Little Gem, Ollie, Reno, Winnemucca, Two Widows, Two Widows Extension Copper Hill Group and Nevada Phoenix, together with all machinery, tools, and appliances, and all other property owned by said corporation and located in the State of Nevada, said sale to be made upon said premises at Tenabo in Lander County, State of Nevada, it appearing to the Court that it is best to sell the said personal property in the manner hereinabove specified, provided that said receiver shall first give notice of said sale of publication thereof for at least once a week for four weeks prior to said sale, in a newspaper printed, regularly issued, and having a general circulation in Lander County, State of Nevada, if any such there be; and if there be no such newspaper published in said Lander

County; or if the receiver in his discretion shall consider some other paper more advantageous, then the publication shall be in such paper so specified or selected, and having a general circulation in the State of Nevada, and said notice shall specifically describe the real and personal property to be sold. Provided, that said property shall not be advertised for sale, nor sold, until after the lapse of ninety (90) days from date hereof; nor until the further order of the Court fixing the time of sale, and other conditions, if any, that the Court may deem proper.

IV.

Said receiver is hereby directed to give notice to all creditors by publishing such notice in the ———, once a week for four consecutive weeks, directing all creditors to file their verified claims with the receiver at an address to be specified, within (90) days from the date of the first publication of such notice; and that all claims not so filed shall be barred; and shall likewise mail a copy [42] of said notice to each known creditor, provided that before the presentation of any claims for the approval of this Court, notice thereof, with a list of such claims, shall be served upon the attorneys of record herein.

V.

Said receiver is hereby directed to keep a complete record of his doings in the premises, including an inventory of all property received, held, or sold; all money expended and debts incurred, and at the earliest practicable date report fully to this Court the exact status and condition of the affairs of said corporation, and of his administration thereof.

The said receiver is further directed to hold all cash received from any source, to be disbursed under the orders of this Court, for the payment of expenses of this receivership, including such reasonable allowances as solicitors' fees and expenses for bringing this action as the Court may deem proper, and distribute the balance under the orders of this Court.

VI.

That before entering upon the performance of his duties as such receiver, said J. P. Raine shall take an oath of office to faithfully perform and discharge his duties, and execute and deliver to the Clerk of this Court a good and sufficient undertaking, conditioned as provided by law, in the penal sum of \$7,500.00, payable to the Clerk of this Court, the Court hereby reserving the right to increase said bond at any time.

Dated this 14th day of February, A. D. 1914.

E. S. FARRINGTON,

District Judge.

[Indorsed]: No. 1183. In the District Court of the United States, in and for the District of Nevada. Charles D. Bates, Complainant, vs. Tenabo Mining & Smelting Company, a Corporation, Defendant. Decree in Equity. Filed February 14th, 1914. T. J. Edwards, Clerk. [43]

**[Notice of Lodging of Condensed Statement of
Evidence, etc.]**

*In the District Court of the United States, in and
for the District of Nevada.*

CHARLES D. BATES,
Complainant,
vs.

TENABO MINING & SMELTING COMPANY, a
Corporation,
Defendant.

Comes now the Tenabo Mining & Smelting Company, defendant and appellant in the above-entitled cause, and lodges the hereto attached condensed statement of the evidence in the foregoing case in the Clerk's office of said court for examination of the other parties to said action, and for the approval by the Honorable Court under and subject to the provisions of Rule No. 75 of the Federal Equity Rules, and when approved, to constitute part of the record on appeal in said cause.

H. C. EDWARDS,
Solicitor for Appellant. [44]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1183—IN EQUITY.

CHARLES D. BATES,
Complainant,
vs.

TENABO MINING & SMELTING COMPANY, a
Corporation,
Defendant.

Statement of the Evidence for Use on Appeal.

This cause came on regularly to be heard in the above-entitled court on Thursday, the 5th day of September, 1912, at two o'clock P. M., before the Honorable E. S. Farrington, Judge of the said court; Mr. J. D. Skeen and Mr. Carwin S. Shank appearing as solicitors for the complainant, and Edwards & Ashton appearing as solicitors for the defendant, whereupon the following proceedings were had and testimony taken and introduced:

[Testimony of John Janney, for Plaintiff.]

Mr. JOHN JANNEY, called as witness for the complainant, after being duly sworn, testified as follows:

Direct Examination by Mr. SHANK.

I reside at Twin Falls, Idaho, and have resided there since 1906. Am secretary of the defendant corporation. I have produced in court all of the books, records and documents of that company; I have them here, except a package that Mr. Ferry, the president of the corporation, has expressed and which will be here.

The defendant company has been using my office since March or February, 1911. This paper marked "Plaintiff's Exhibit 1" is the articles of incorporation of the defendant company. I became the secretary of the defendant company on the 5th day of March, 1910. I was a stockholder in the subsidiary company, the Tenabo Consolidated Mining Company, and as a director and stockholder I was interested and voted on the question of the formation of the

(Testimony of John Janney.)

defendant company, and negotiated with the possibility of forming this alliance and tried to determine whether it was wise to consolidate these two companies, and tried to find out if there was a feasible way of getting them together. These [45] negotiations were with Mr. Locker and Mr. Tyree. Mr. Locker and I were interested in the Tenabo Consolidated Mining Company. We held, I guess, fifty per cent of the stock of that company. Mr. Tyree was the president of the Gem Consolidated Mining Company. Personally I never planned for the sale of the stock of the defendant company until my return to Salt Lake City, until after the corporation was formed. My plan up to that time was not to have anything to do with the financing of this company, the plan was that Mr. Locker and Mr. Tyree had brokers in the east who could finance the company; then after the company was organized, some month or two, it might have been three or four weeks, Mr. Locker and Mr. Tyree came to me and explained that they would like to have me drop my other work and all of us join ourselves together and finance this company and get it done with and then take up the other things after. There were plans to have five hundred thousand to be treasury stock. The Gem was to get four hundred thousand to pay for the Little Gem property, the Tenabo Consolidated Mines Company was to get three hundred thousand shares and one hundred thousand remaining; and also the proceeds from the sale of two hundred thousand shares of outstanding stock to be equally divided between Tyree

(Testimony of John Janney.)

one-half and Locker and Janney one-half. That was before the incorporation of the Tenabo Mining & Smelting Company and also it was subject to the subsequent ratification of this plan by the directors and by the stockholders of the companies. That was reduced to writing. This writing was marked "Complainant's Exhibit 2" and offered in evidence, but was objected to by Mr. Ashton as incompetent, irrelevant and immaterial and not within the issues, but was overruled by the Court, the Court saying: "I of course do not know what there is in the document, and I think I will simply admit it subject to the objection, and of course, if it is irrelevant and immaterial, I will not consider it. Exhibit 2 reads as follows:

"New York, June 25th-08. Memorandum of Agreement of Division of Stock. To form a Consolidated Company of 1,500,000 shares, of which 500,000 shares to be treasury stock. Highland to have 500,000 shares of stock at 25¢ a share—300,000 shares treasury stock and 200,000 shares outstanding stock.

[46]

This leaves 800,000 shares of outstanding stock to be distributed as follows: 400,000 shares to pay for Little Gem properties. 300,000 shares to pay for Tenabo Consolidated properties. 100,000 shares remaining and also the proceeds from the sale of 200,000 shares of outstanding stock to Highland is to be equally divided between Tyree, one-half, and Locker & Janney, one-half. (Signed.) H. Tyree. John Janney."

(Testimony of John Janney.)

The COURT.—I presume this testimony goes to your statement or to the issue that it was a stock-jobbing concern rather than a legitimate mining concern?

Mr. SHANK.—Yes.

The COURT.—I will state in nearly all these cases where there is no jury, it has been my practice to admit all the testimony which is offered apparently in good faith by either party, provided it has any bearing whatever on the case, and it usually goes in subject to that objection, and if at the close of the case you still wish to insist on those objections, I should like to have them called to my attention. Of course there will undoubtedly be a vast amount of testimony introduced in this case; some of it will be very relevant, and some of it will be rather questionable. And when I come to consider that testimony, I shall not take it all, I shall simply take those points which seem to me, and which seem to counsel in the course of their arguments to be material. I do not like to take the time during the progress of a case in listening to arguments on the admission of testimony, unless it is something which you regard as absolutely vital to your case.

Mr. ASHTON.—In that connection—while the matter is fresh in our mind, I desire to call attention to the fact that it does come within the statement made by counsel, but does not come within the issues as framed by the pleadings in this case. There is no allegation this was a stock-jobbing proposition but that is *confirmed* wholly to the statement of coun-

(Testimony of John Janney.)

sel; there are no pleadings whatsoever where that allegation is made.

Mr. SHANK.—I don't need to plead it was a stock-jobbing proposition, or robbing proposition, or anything of that sort. I plead, as a matter of fact, it is not a fact, in any proper sense, a corporation organized for legitimate purposes. That comprehends the whole thing. That is definitely pleaded, and that is all that need be pleaded. I do not need to particularize the details by which it is not a concern properly conducted. [47]

The COURT.—Where is the allegation?

Mr. SHANK.—Paragraph 10, your Honor. Your Honor will see that covers in general terms, the situation. (Reads.) There is a specific and definite allegation upon that very point, that the whole thing was simply to sell its treasury stock, and not actually to do a legitimate business, as defined by its articles of incorporation.

The COURT.—Was this agreement as to the sale of treasury stock?

Mr. SHANK.—No, this was for the disposition of all its stock, and bears upon the treasury stock, as well as all the other stock.

The COURT.—It will be admitted subject to the objection.

Mr. SHANK.—I don't know what the rule is in reference to preserving exceptions. I want to expedite the case as much as possible. I am just asking for information. With us an objection implies an exception.

(Testimony of John Janney.)

The COURT.—The exception will be noted if you desire to have an exception taken. The testimony is admitted subject to that objection and that means simply that the Court may change its mind before we are through with the case.

Mr. ASHTON.—The query we are both interested in is whether or not we shall preserve our exceptions as these *pro forma* rulings are made?

The COURT.—I think you had best do that. An objection is made, followed by an exception, after the ruling of the Court, if you desire to take one.

Mr. ASHTON.—I desire to save an objection.

WITNESS.—There was some stock sold by Mr. Locker in the early part of 1909, I believe in February. It was sold to some gentlemen in Salt Lake City, one of them I remember was Mr. Knox. I don't know how much was sold to Mr. Knox, I have not as yet had the books of the company formerly made out. We have no book in which to make entries of cash receipts. We have only entered in the bank some six or eight entries and the entry that is made in the bank there is a voucher made for that purpose. The defendant company has a voucher. I have the vouchers. I find on looking at the minutes where I thought the name of Mr. Knox appeared, which includes a list of stock of those to whom Mr. Locker sold stock, that Mr. Knox's name is not present. I would say it is possible that Mr. Locker sold to Mr. Knox a contract to deliver to him stock at some later [48] date. I remember Mr. Locker was in a position where he required funds in order to start his

(Testimony of John Janney.)

work of the financing of the company and he secured those funds from Mr. Knox and a few others, by what possibly was a contract that he would deliver to him so many shares of stock, but I don't know anything about that transaction except what I have heard, and that was not very definite. I do not know whether Mr. Knox ever acquired any stock. Page 25 of the minute-book shows minutes of the meeting of January 25, 1910. They are as follows: "Salt Lake City, January 25, 1910. Minutes of Directors' meeting of Tenabo Mining & Smelting Company held this day pursuant to due notice. Present Messrs. Clark, Varian, Edwards and Badger. Moved by Mr. Edwards that Mr. Varian be authorized to incur any necessary expense and to employ an attorney to represent this company at Austin, Nevada, in suit Lloyd Seaman vs. Gem Consolidated Mining Company, duly seconded and unanimously carried. Moved by Mr. Edwards that Windsor Trust Company be authorized to issue stock to the following named persons who have paid for same and who hold receipts for the number of shares set opposite their names:

Olsen.....	500	shares.
Auerbach.....	100	"
Wilson, C.....	500	"
Wilson, E.....	500	"
Rinking.....	500	"
Phelps.....	500	"
Crandall.....	110	"
Newcomb.....	100	"

(Testimony of John Janney.)

Pitts.....	50	“
Berry.....	100	“
Nettenstrom.....	200	“
Petitt.....	100	“
Paige.....	50	“

Mr. Locker presented proposed contract with a French Bank which was discussed. On motion meeting adjourned. R. T. Badger, Secretary.”

I would like to explain that this resolution was the voting of the issues of stock to these parties who had signed applications for the purchase of the stock. I do not know that this company sold to F. J. Hagenbarth 4,000 shares at 50 cents per share, or 5,000 shares to Frank Knox at 50 cents per share, or 2,000 shares to Mr. McCormick at 50 cents per share, or to the Anheuser-Busch people at St. Louis 2,500 shares at 50 cents per share; all I know about that is that it is hearsay. I don't think I ever heard of the Anheuser-Busch sale. I don't think there is any record made by Hiram Tyree in the east, I never heard of such a record. The only record that we had were the minute book and the vouchers. To execute a [49] voucher receipt we entered the transaction on the voucher just as you enter it on your book, only you do not open books of the corporation usually until you have got enough entries so an expert could come in and open your books right, at least no company that I ever was connected with did.

Here Mr. Shank asked the witness for the vouchers showing all of the receipts of the company and is given a bundle which the witness says are all the

(Testimony of John Janney.)

vouchers. Those are all the vouchers we have; that pile of vouchers you have there wrapped up, together with a bundle, contains all of the credit and debit vouchers too, if I am correct in my impression, but the other bundle contains a record that has not been completed because I have been away from the office and the vouchers that represent money which has been received have not been written up since the date of my going east. That was in December last year. I have a record of all of the receipts that have been made but they have not been entered yet on the vouchers. Here is a statement which shows what we have received. It is a statement from the Franco-American Bank. This statement is contained in these letters and other papers that you have. The certificate books are in the hands of the express company. They should be here. They are coming from Mr. Ferry. We have two stock records. I don't know whether you would call them ledgers or not. One is kept by the Union Trust Company in New York who registers all the certificates of stock. A certificate of stock is not completed until it has been registered by the Union Trust Company of New York, and when they register a certificate of stock they make an entry in their books and here is that record. Then the stock is also, before it is issued, transferred or written up and in fact issued by the Windsor Trust Company, the Windsor Trust Company keeping a record and here is their record. I have been keeping part of these records in my office and part of them in a safe deposit box. I mean the

(Testimony of John Janney.)

office of myself and Mr. Locker. We have been considering it the office of the company. I returned from the east when I got notice of this suit. I arrived in Salt Lake last Tuesday. I left here last November and returned the latter part of August, 1912. These records were all kept in my office and in safe deposit vaults. I have a box in the Merchants' Bank [50] and one in the Utah Savings & Trust Company. I mailed a key to my office to Mr. Ferry, president of the company. I did not tell him or any officer or agent of the defendant company where those records were kept. I told Mr. Ferry where they were. I sent him a key to my office and told him if he wanted anything there was a key to my office. I would like also to say that when I went away I expected to be gone only a few weeks. I was gone eight months. No money was received by me; it was received by the treasurer of the company. While I was away I knew all about it that a man could know. These letters that came to me were kept by me and those that went to Mr. Howard were kept by him. We have no mining claims patented, except two, the rest of them are simply locations that we have to work the assessment on each year. We have no other property, no office furniture, no safe or other office equipment. In order to economize the company's expenses things of that nature are now furnished to the company by others free of charge. The services of the officers are furnished at a nominal price that amounts to the same thing. The salaries of the different officers have been fixed by the Board of Direc-

(Testimony of John Janney.)

tors. In the minutes of the corporation of date the 7th of January, 1909, it provides for the payment of \$50.00 a month to Judge C. S. Varian, as attorney for the company. There is another resolution of the same date providing for the payment to H. P. Clark, president, H. C. Edwards, vice-president, R. T. Badger, secretary and treasurer a monthly salary of \$50.00 to each of said officers. There is no limit of time fixed in the resolution. It was never modified that I know of. The cash record will show the amount that was paid, I cannot speak from memory. I think Mr. Edwards received no money except a sum of money that he got as attorney's fees. I do not think he got that \$50.00 a month. By cash record I mean the vouchers shown a moment ago. They and this statement would show how long that continued. I did not make this statement, it was made by a certified accountant, J. W. Edmunds, of Salt Lake City. It shows under the head "legal fees and salaries" the amount paid up to the date of that statement. This is a statement from the beginning of the company down to the date of August 21, 1911. This other is a statement from the beginning of the company down to [51] February 9, 1910; both statements are complete down to the dates specified. They are a correct showing of the books of account of the company as far as I know. I submitted to Mr. Edmunds all the vouchers and documents to make up this report. I do not know of my own knowledge but that is correct. On March 5, 1910, there was a subsequent resolution passed bearing

(Testimony of John Janney.)

upon the salaries that were to be paid to any subsequent Board of Directors. At that time there was a change in the Board. The Board of Directors designated in the articles of incorporation, that is Mr. Clark, Mr. Freed, Mr. Badger, Mr. Varian and Mr. Edwards continued to hold as directors until February 5th, 1910. On February 5th W. Mont Ferry, E. O. Howard, Benner X. Smith, John Janney and John Pingree were elected directors. They are still in office. None of the first directors were named by me. I was a member of the directors of the Tenabo Consolidated Company. As well as I recollect the board of the new company was a part of the agreement of these two corporations when they merged. A list of directors was presented, as I recollect, to the board and they approved of these directors when they merged but I am not going to be positive about that; that is a matter of memory and those things occurred a long time ago. That board held until the early part of 1910, when the present board was elected. After the election of the present board there was another resolution fixing their salaries. It was on the date of March 5, 1910. The part of the resolution fixing the salaries reads as follows: "Resolved that the directors of this company be allowed as compensation the sum of \$50.00 per month each." "Resolved that Stephens, Smith & Porter, attorneys, be employed as the attorneys for the corporation." There was \$713.49 in the bank February 9, 1910.

(Testimony of John Janney.)

There was practically none of it paid out as far as I remember.

Court adjourned until September 6, 1912, at 10 A. M.

Witness JOHN JANNEY, direct examination by Mr. SHANK continued.

I am in a way a partner of Mr. P. B. Locker. I have equal stock interests in certain corporations and as stockholders in those corporations we distribute among ourselves the labor of making a success of those corporations and also distribute among ourselves the benefits derived from such labors. These corporations include the Tenabo Consolidated Mines Company which holds stock in the Tenabo Mining & Smelting Company. That [52] partnership was formed in 1907 and continues to this date. We have never had any articles of agreement drawn. The firm name is Locker & Janney. We have an office. The office bears the name of P. B. Locker and John Janney, but not the name of Locker & Janney and the letter head printed "Locker & Janney" was printed one day when I was away from the office. I think it was in 1907. I concluded to let it go. I heard of the sale of 2,000 shares of stock to J. D. Wood, 4,000 shares of stock to F. J. Hagenbarth, 5,000 shares to Frank Knox, 2,000 shares to William McCornick, 1,000 shares to Auerbach and 2,500 shares to an agent of the Anheuser-Busch Brewing Company. I heard of it in June or July, 1909, in New York. I heard an explanation from Mr. Locker as to the sale of that stock but I don't think there was any conversa-

(Testimony of John Janney.)

tion in my presence between C. C. Wylie and P. B. Locker in New York in reference to the sale of treasury stock to these particular parties named. I think I would recall if there was any. I heard Mr. Locker make an explanation that there has been this stock sold and the parties to whom it was sold had paid Mr. Locker and give him checks drawn to the order of the Tenabo Mining & Smelting Company. I saw one check, I believe, but I don't remember to whom that check was drawn. I think it was a thousand dollars and signed by W. S. McCornick. Mr. Locker gave it to Mr. Badger, secretary of the company, and he turned it into the company. I did not see any signed by Hagenbarth but I might have seen a check signed by Mr. Knox; I am not sure of that. I did not see any signed by Mr. Olsen or by J. D. Wood. The minutes of July 3, 1909, found on page 13 of the minute-book, are part of the minutes of the Tenabo Mining & Smelting Company and read as follows:

“Minutes of meeting held July 3d, 1909, pursuant to due notice. Present H. P. Clark, H. C. Edwards, C. A. Varian and R. T. Badger.” “Upon motion the secretary was instructed to write to Mr. P. B. Locker, requesting information regarding the sale of stock in the Tenabo Mining & Smelting Company to Messrs. Frank Knox, W. S. McCornick, F. J. Hagenbarth, Hugh Wood and Mr. Olsen, and requesting to know whether it was thoroughly understood between him and the various parties that money paid to him by them was to go into the Treasury of the company,

(Testimony of John Janney.)

and that they were not receiving treasury stock for their subscriptions. [53]

“On motion the secretary was instructed to inform Messrs. Locker, Janney and Tyree that option given them for sale of 600,000 shares of treasury stock, dated Jany. 14th, 1909, would be cancelled July 15th and that same would be of no further force or effect after said date.

“On motion, the meeting adjourned. T. R. Badger, Secretary.”

There were inquiries made with reference to a sale of stock from Mr. Locker and he made reply in writing. It was a partial reply from Mr. Locker with reference to the inquiry that was made. There was a written and verbal statement made. The three writings that are here and are attached came as a reply to the company from Mr. Locker. They were all attached together when I got them from the secretary. I don't know how they were transmitted by Mr. Locker to Mr. Badger, whether as one instrument or at separate times. I think Locker had typewritten the third leaf of this bundle of papers which is not signed and has no heading and consists simply of typewriting and I knew that he made that reply. I know that Mr. Badger had these three pinned together on turning over the records. I know that at the time Mr. Locker wrote this letter of July 12th, I was in New York with him and read it, and to the best of my recollection and belief that is what was pinned to it. I feel confident that he did. (Letter admitted in evidence, marked Complainant's Exhibit

(Testimony of John Janney.)

No. 3, and read by counsel.)

The report of P. B. Locker to the Tenabo Mining & Smelting Company under date of February 28th, 1910, is a report made to Mr. R. T. Badger, as treasurer of the company. (Paper admitted and marked Complainant's Exhibit No. 4.)

At this point it was agreed between counsel that only the last page of the report made by J. W. Edmunds above mentioned was material and this was admitted by the Court and that a copy might be substituted. This was marked Complainant's Exhibit No. 5.

I don't know who received the \$25,000.00 shown as a receipt in Exhibit 5, but I *think there* is a record I could find it. Latter marked Complainant's Exhibit No. 6, admitted and read by counsel. This 165,000 shares of stock was sold. I don't know by whom. My knowledge is that the directors passed a resolution to the effect that they needed money to pay off [54] the mortgage and to do the development work and offered bids on the stock. The next matter that I have of knowledge is that the company delivered that stock as per that record to the Windsor Trust Company to be turned over to the McCornick Brothers of New York and the company received, as I understand it, of McCornick Brothers of New York \$25,000.00 or some such amount. I think this stock was not sold on the curb in New York; I have no knowledge, however. I don't think there are any letters showing how it was sold. I have a bunch of letters from Mr. Hiram Tyree that I have never read

(Testimony of John Janney.)

over and some of them seem to bear on the sale of the stock.

The credit memorandum of the Utah National Bank is a part of the records of the company, and reads as follows: For credit of Tenabo Mng. & Smg. Co. With the Utah National Bank. Salt Lake City, Utah. 3/16/1910.

	Dollars	Cents
McCornick check.....		
Gold coin.....		
Silver.....		
Currency.....		
Checks.....	1000	Duplicate Badger.

Plaintiff's Exhibit No. 5 discloses that excepting this 165,000 shares there seems to have been sold only 2,250 shares additional but there have been other stock sold than those disclosed here. At this time I have a record of a gross of 66,000 shares, from which is to be deducted 30,000 or a net of 36,000 shares of stock which the company is short on account of the sales or which it has sold but I would like to check this at my leisure. These sales were made on December 16, 1911. There is a sale reported of 30,000 shares by the company. I cannot say who acted as the particular individual who sold it. The report comes from the Franco-American Bank but I only know what the record shows. The record shows that the company entered into a contract with a banking firm in France. Bernard Desouches, I think, is the name of the firm and the contract specified that cer-

(Testimony of John Janney.)

tain stock should be deposited with the Franco-American Bank and delivered to this French banking firm upon the payment of so much money. This contract was negotiated by Mr. Locker but the contract is made between the company and the French banking firm directly by virtue of the specific power of attorney in Mr. Locker. I have had correspondence with Mr. Locker since the sale of that stock reporting the sale and have the correspondence. However, there has been no report from Mr. Locker continually reporting the [55] sale of the stock. There has been a report as to the general conditions and the sale of the stock speaks for itself. The total amount received by the company since the report as contained in Exhibit 5 is \$2,887.18. On July 15, \$724.65, in March, 1910, \$1,000.00, in May, 1911, there is an entry of \$7.18 which did not come from stock sales. It was deposited to meet an overdraft, I think, These items are taken from the statement of the Utah National Bank as to the bank account. The items I have given, plus the items contained in Mr. Edmunds' report, contain all the cash receipts of the company but there is one cash receipt for \$34.82 on May 24, 1911, which was made in my absence and which I will explain to-day or to-morrow. I have sent a telegram to Mr. Howard to find out about it. In reply to the question asked some time ago, the 30,000 shares have been sold to Bernard Desouches was on December 16, 1911, and on March 29, 1912, there was 10,000 shares sold, under the same contract, for 15,000 francs. On December 2, 1910, there is a

(Testimony of John Janney.)

record here which shows that 21,429 shares was paid out of the treasury against which 130,000 shares was received into the treasury on account of the French contract. I think that is all. The total aggregated 36,000 shares after deducting 30,000 shares the company has received back. To explain I will say that the laws of France, which seem to be the only place at that time at which we could finance the company, required that they look into the affairs of the company, and requires that the department of the French government look into the affairs of the company and to compensate them for that they exact a tax of \$10,000.00. In order to comply with the laws of France you have to meet their requirements as to the form and nature of the securities, which require considerable expense. The printing of these securities required I think three or four thousand dollars and the issuing of them and signing of them, etc., was expensive. In that way they estimated the expense necessary to be put up by the company at something like \$30,000.00. They first estimated it I believe a good deal higher than that. The company declined to put up that \$30,000.00. Mr. Locker, who was representing the company in this matter, and had been to France and conducted certain negotiations and who had returned and was reporting to the company, stated that he did not know, unless the company could put up this \$30,000.00, how [56] they would be able to get access to the French market; somebody had to put up the money. The matter was discussed at considerable length in board meetings and outside,

(Testimony of John Janney.)

and somebody had to put up the money and that was the reason that this company gave out this block of stock which brought in this \$30,000.00, but the company not wishing to lose that \$30,000.00 and not wishing to take any chance of losing it, Mr. Locker and myself gave back to the company the \$30,000.00 out of our own stock so as to save the stockholders of the company in going on a wild goose chase after financing the plan in Europe. Hence, it is we deduct this 30,000 shares now on deposit in the Windsor Trust Company and to secure the company for the 66,000 shares, the total amount then due, which leaves the company out 36,000 shares.

Mr. Locker's stock, and mine, has been issued. It is a very hard thing to make clear, and unless you make it clear it is going to be very confused. We placed stock with the Windsor Trust Company, 450,000 shares and that stock is still in the Windsor Trust Company. Now, then, the Windsor Trust Company placed in the Franco-American Bank 450,000 shares and the Windsor Trust Company certified that this 450,000 shares had been deposited in the Windsor Trust Company, because the laws of France require that you circulate a security that passes to bearer and that is issued by a trust company, wherein the trust company contracts that they will deliver to the bearer of these trustee certificates the certificates of stock upon demand. At the present time there are with the Franco-American Bank 45,000 certificates which is 450,000 shares, less the amount that they have paid out which I figure here at 6,600 certificates. I think

(Testimony of John Janney.)

all of the officers of the Tenabo Mining & Smelting Company understand this transaction, and I think they all understood it at the time they entered into it thoroughly. I explained that Mr. Locker and myself out of our own holdings turned into the treasury of the company 30,000 shares of stock. We had to do that in order to make it possible to finance this company. So that the sales of stock since Mr. Edmunds' report is 36,000 odd shares, that is what I estimate. I asked for thirty days' notice to come back here and fix up the records of this company, and I have been brought here into this court from the east on such short notice that I could hardly get away, and we really should not come into this trial now but we are forced in here because we [57] cannot get a reasonable time to fix these things up. I have been in the east in the interest of the company.

The thing I make the calculation from is the deposit book in the bank, and from the statement of the bank, and from the letters. The company owes Mr. Locker, I assume the amount stated in that statement of Mr. Edmunds which is \$902.00 of which \$50.00 has been paid. That is the amount that is stated to be due Locker on an account between Locker and the corporation. Locker was entitled to a credit from the company for railroad fare, Pullman, meals, etc., trip to Tenabo, R. W. Rogers, Duncan MacVichie in December, 1908. \$158.30 R. W. Rogers, services in examination and report, \$100.00. The items I am reading here are contained in the Locker credit. I have no books or statement

(Testimony of John Janney.)

except the minute-book, showing in detail the amount that the company owes. The minute-book shows in detail the \$8,000.00 odd that the defendant in its answer states that it owes.

The company has an encumbrance, I think, of \$1,000.00 to Mr. Shearman. It is secured by a mortgage which has been extended to May 16, 1913, by written extension. There is no other encumbrance on the property that I know of. There is a matter that was a cloud on the title of the Gem Company which conveyed its property to the Tenabo in the nature of a lien called the Seaman lien, which I have no personal knowledge of, but which the Tenabo Company may have to pay. I don't know what the status of it is. Mr. Price, the attorney for the Gem, told Mr. Smith, the attorney for this company, that that matter had been settled and disposed of. We are not concerned about that because it is a matter that belongs to the Gem Company to pay, and we believe that they are responsible and can pay it. We proceeded on the theory that that lien had been disposed of as reported by Mr. Price. There is no other lien on the property that I know of. I never heard about the claim that one Adsit has to go into the property and took out ore to satisfy an obligation that he has against the company. I heard of—whatever it was, given to Mr. Adsit by Mr. Tyree as president of the Gem Company to secure the advance that Mr. Adsit made to assist in the consolidation of these companies. Since I have been an officer of this company I never heard anything being done by this

(Testimony of John Janney.)

company which would tend to cast the burden of paying that debt on one company rather than the other. [58] There is nothing in the record which shows the Tenabo Mining & Smelting Company has ever assumed the obligation of the Gem Company and there is nothing in the record about that obligation that I know of and I don't think there is anything. Mr. Adsit, of New York, was interested extensively with us in our Tenabo Consolidated Company which merged with the Gem Company. His son was superintendent of the property before the merger. He was a stockholder in the Tenabo Consolidated Company and he knew conditions. Both of them were very much interested in the success of the corporation. At the time when in order to make a success of a merger which was talked of between the two companies we needed a sum of money to take an engineer from Boston to this property to make an examination—which report of the engineer was supposed to be satisfactory to some people that Mr. Locker had been in negotiations with to finance the mine. Now, in order to get that engineer up there and in order to get all things done that had to be done, we had to get some money and we thought of turning to Mr. Adsit, and we went to him and explained what we proposed to do. A paper was drawn up by Mr. Tyree which was signed by the Gem Consolidated Mining Company by Tyree, President. It was also signed as well as I recollect by the Tenabo Consolidated Mines Company by P. B. Locker and endorsed by Mr. Locker and by me personally. The

(Testimony of John Janney.)

money, \$5,000.00, was not paid over at the time that note was drawn but we were all there and we perhaps would not be there again, so these papers were drawn in case Mr. Adsit should decide to put this money in. I have a recollection of Mr. Tyree signing some kind of a paper binding the Gem Company to let Mr. Adsit have the ore reserved as security. Now, Mr. Locker and myself together gave certain land that we had as security. We offered Mr. Adsit a bonus of our personal stock if we should succeed in forming this company which we didn't know whether we would or not, so that Mr. Adsit, not knowing that this company would be made at all, was taking this security and the papers were drawn in that way. It was assumed at the time of the signing of those papers that Mr. Tyree would be able to secure the ratification of his company and that Mr. Locker would be able to secure the ratification of his company to that transaction, and Mr. Adsit, in advancing [59] the money before that ratification was made, realized that he was taking that chance because he knew that the ratification of the companies had not been made. Mr. Adsit, after deliberating and considering the matter for some time, finally made an advance of \$2,500.00 and the rest of that is hearsay from that on. That \$2,500.00 came into the Tenabo Company. I remember a meeting of the Board of Directors where they ratified the transaction as far as our part of the transaction was concerned. Ratification was made by the Tenabo Consolidated Mines Company before they merged and

(Testimony of John Janney.)

formed the Tenabo Mining & Smelting Company and the whole transaction took place with this merger in view. I did not even know that we would be able to effect it at that time. As near as I remember, the document marked Complainant's Exhibit 7 is the agreement effecting the Adsit deal.

Recess until 2 o'clock P. M., after which court resumed session.

JOHN JANNEY, direct examination continued.

The total amount of cash received from the sale of stock as I make it is \$34,750.68. These figures have been hurriedly compiled and it is a lot of work to go through these. We have data but to do this kind of work is a thing that takes time.

There is some money the company has got for which it has not yet issued stock, so the \$34,750.68 represents the sale of stock, all of which has not yet been issued.

The company owed \$750.00 on account of the Shearman mortgage and a reasonable attorney's fee to the attorney in this case, which is a retainer of \$500.00 and a fee of \$50.00 *per diem* for the time employed, the expenses of the attorney, except that if the attorney is here on account of Gold Quartz or other matters, that the expenses do not attach. That is the understanding with the attorney of what a reasonable attorney's fee is and is to be in full compensation for their services in this case. In addition to that the company owes on account of director's salaries \$7,000.00, from which item must be deducted the amount that has been paid to date. From

(Testimony of John Janney.)

March 18, 1910, to May 15, 1911, 14 months, there have been five directors. There has been paid \$1,700.00 to the directors, which leaves \$5,300.00 still due. We owe Ferry \$1,200.00; there was a tacit understanding among the [60] directors that this money was to be paid, if at all, when the company is in a position that it can conveniently do so. It owes John Pingree \$800.00 and it has paid him \$200.00. It owes Ferry \$1,300.00 and has paid him \$200.00. It owes Benner X. Smith \$1,300.00 as a director. Mr. Howard \$1,300.00, me \$1,100.00. They owe Stephens, Smith & Porter, the attorneys for the corporation, for their services on which two payments have been made, I should judge less than or about a thousand dollars. I don't know just what they do owe them. Mr. Ferry became a director and rendered the company services. He saved this company from being wrecked by a lot of highbinders and blackmailers and people who were conspiring to wreck the company, and it took a substantial man with a good name and of immense ability to cope with these conditions that have been arising continually. Mr. Ferry attended directors' meeting throughout the month of March and at intervals of time that were frequent, which I cannot recall how frequent but they seemed to me nearly every afternoon. We simply made a record of such meetings where we adopted a resolution but did not make any record of meetings where we met together. Some were not formal meetings, and in connection with Mr. Ferry, I am referring to both. In March, 1910, I

(Testimony of John Janney.)

count 3 meetings, and he attended informal meetings, of which we have made no record. I see no meetings in April, May or June; July 1, August 1, September 2, October 2, November 2, December 2, January, 1911, none, February 1, March 1, April none, May 1, June 1, July 1, August 1, September none, October none, November 1, December 1. No other meetings were held until April, 1912, when one was held. The next meeting is in June, 1912. Mr. Ferry was generally present. He attended a great many other meetings than those for which there is a record in the minute-book. Mr. Smith was the attorney for the company and we submitted to him these contracts and he advised the board. Mr. Pingree did the same as Mr. Ferry in the way of directors' meetings while he was a director, but he was not a director during the year 1912. Mr. Skeen asked to be put on the board and we were willing to put him on but he did not qualify. Mr. Smith was on the board and attended meetings regularly. He was at all the meetings, I think. He was paid for his services as attorney and I suppose that would probably be deducted. I [61] would like to add that there is not a man on this board who is going to ask for the payment of this money provided under this resolution unless at the time he takes it he thinks it is due him. I know personally I won't, and I believe the rest of them are in the same position. It was voted by the Board of Directors and has been carried along as an obligation. I will file a renunciation right here that I don't want any salary as an

(Testimony of John Janney.)

officer of this corporation or any other corporation that I do not deserve and do not earn. They owe me \$1,100.00 but they will never pay me any of that amount that I have not earned. They owe Mr. Smith \$1,300.00 under the resolution and they also owe his firm as attorneys for special services. Mr. Howard did not perform any services except as a director. He is a banker. Mr. Ferry has mining interests. Mr. Pingree is a banker. Each is actively engaged in the work of their respective lines of business. A bill was presented by myself and Locker as shown by the minutes of the company under date of September 7, 1909. The minutes read as follows:

“Mr. Janney presented a bill for expenses aggregating in the sum of \$2,082.75. Upon consideration it was ordered that the charge of \$1,800.00 made for office rent and expenses of Locker & Janney for the year ending December 31st, 1909, and the charge for a city directory of \$6.00 be denied as not proper charge against this company; and that the charge for stock certificates of \$105.00 and for the corporate seal of \$2.50 be denied, the same having been heretofore paid by the company.”

I want to say that I think there is a decided mistake in that, at least I have an impression at the time I was very much irritated by it. There was a misunderstanding. I cannot be sure that it was presented for that amount. There was a bill presented but whether that is an exact reproduction of it or not I don't know. I know that that is not a

(Testimony of John Janney.)

correct showing of that bill; there is a misunderstanding and misstatement in there somewhere of the bill that I presented. Minutes of the Board of Directors of the Tenabo Mining & Smelting Company held on November 27th, 1909, is about the time the bill was presented. The minute was offered in evidence and read as follows: "Minutes of meeting of Board of Directors of Tenabo Mining & Smelting Co. held pursuant to notice Nov. 7th, 1909. Present H. P. Clarke, C. S. Varian, L. D. Freed, H. C. Edwards and R. T. Badger. [62]

"It was moved by Mr. Varian that bill of McCornick & Co. for note of Gem Consolidated Mining Co. together with interest thereon, including attorney's fee, etc., which amount to \$18,860 should be paid; seconded by Mr. Freed, and carried.

"It was moved by Mr. Edwards that Mr. C. S. Varian bill for salary as attorney and incidentals amounting to \$700.00 be allowed and paid. Unanimously carried.

"It was moved by Mr. Varian and unanimously carried, that secretary's salary for 11 months amounting to \$550.00 be allowed and paid.

"It was moved by Mr. Edwards duly seconded and unanimously carried, that Mr. Clark and Mr. Freed be paid 11 months' salary at \$50.00 per month for extraordinary services rendered to the company.

"On motion duly seconded, the president was empowered to employ Geo. Weston to superintend assessment work on properties at a salary not to exceed \$5.00 per day. Carried.

(Testimony of John Janney.)

“It was moved and carried that taxes for 1909 be paid. Bill of Locker and Janney, amounting to \$2,082.75 was presented to the Board, and on motion filed.

“On motion duly seconded, and unanimously carried, bill of Mr. C. S. Price amounting to \$163.30 for patenting “Two Widows” claim was ordered paid.

“There being no further business, meeting adjourned. R. T. Badger, Secretary.”

The bill of Locker & Janney, a part of it, I think, they owe and a part of it they don't owe. That is a very complicated matter. That bill includes a lot of time as well as I remember it. There was \$3,687.50, the amount of this bank statement of the Utah National Bank shows deposited from Mr. Locker. The trust company shows that there has been issued against that 2, 200 shares of stock. That may be an item that enters into that account because it would show that Mr. Locker had deposited a great deal more money than the stock received because the showing is that he has received only \$1,350.00 from the amount so deposited. Minutes do not show what the items of the bill were. I want to say now that that minute is not correct. For instance, just to show you that the amount put there for a [63] directory is for putting the name of the Tenabo Mining & Smelting Company in the directory and it wasn't a bill exactly presented to the board, it was a matter presented to the board for them to pass upon, whether they thought the company should pay it. And the office rent was simply this, that the affairs

(Testimony of John Janney.)

of the Tenabo Mining & Smelting Company have to have some office and there was a lot of typewriting and stuff in our office, and when we distributed the expense of our office among the various items, we thought it ought to be divided among us, we simply submitted it to the Board of Directors and I forgot the items—and I remember that resolution there is something that gives an entirely wrong impression. Now, if that is true, what the company actually owes us under the head “office rent” is absolutely disregarded, because it was simply a matter put up to the company to determine whether or not they should pay it, that was all there was to it. As I understand the matter, they do not owe any of that to us now. There may be something there that they owe but I don't know what it could be. There is a claim that Mr. Locker will probably have when the balance of this account is shown here. There is nothing they owe me that I know of. They owe Mr. Locker a fair settlement on this stock; he collected certain money from certain stock and there was entry made in the book of a deposit of the money. The stock had not yet been issued. When the time comes for the directors to take that matter up and adjust this statement will be something of a guide of what the company will pay him, and I would say as a matter of opinion that the company owes him \$902.00 on this. I cannot think of anything else. I think there is no officer of the company who has any data upon these matters other than myself. Mr. Howard had the bank-book that you see and Mr. Ferry had the

(Testimony of John Janney.)

bundle of papers containing the stock certificate book, not in his custody, but they were available to him. A man by the name of Jones had them and it practically amounted to the same thing. By the resolution of November 27th, \$700.00 for salary to Mr. Varian, according to Complainant's Exhibit No. 5, as attorney was allowed and paid. I assume that that contains the monthly salary plus services which he rendered in some cases. I assume that he will correct the statement if I find that it does not. Mr. Varian's statement shows. November [64] 27, to services \$550.00, January 1 to November, both inclusive, 11 months; to services in Lloyd Seaman vs. Gem Mining Company, \$50.00; C. C. Wylie and others against Tenabo Mining & Smelting Company, to services in the above case, \$100.00; total, \$700.00. The record shows that according to Plaintiff's Exhibit 5 the sum of \$1,025.45 was paid to H. C. Edwards for attorneys' fees. Mr. Edwards was employed by Mr. McCornick to foreclose that mortgage and when the mortgage was paid the amount of the mortgage was paid to McCornick without including an attorney's fee and the attorney's fee was paid to Mr. Edwards. Mr. R. T. Badger was paid \$650.00 as a director of the company; Mr. Clark was paid \$550.00 as president; Mr. Lester D. Freed \$550.00 as a director. I don't know what services Mr. Varian, Mr. Badger, Mr. Clark and Mr. Freed rendered to the company other than that for which they were paid a special compensation. There are 29 pages in this book that are the records of the proceedings of

(Testimony of John Janney.)

the first Board of Directors. The assessment work has been done on a part of the claims for the year 1912. On the Ollie and Reno, which is the Gem group, we have spent a good deal more than the assessment work. On the others we have not done any. There are twelve claims and the amount of assessment work is \$100.00 per claim. Two of the claims are patented. The assessment work must be started before the end of the year; the performance can run into the next year. The book which you hand me which purports to be the register of stock of the Tenabo Mining & Smelting Company is a copy of the book kept by the Union Trust Company. We have never made up a ledger account with any of these concerns. I think we have paid the Windsor Trust Company \$459.85. That is the amount paid for being registrar of the stock. You have to have an absolutely responsible institution as a registrar of the stock, because they are responsible if your stock issued is more than your books show and you have to have somebody where you are handling stock that you hope to be valuable that is responsible. Now, they charge for that responsibility. The amount for making a copy of that book was \$10.00. Here is a bill for \$8.10 for putting through 162 certificates. They charge 5 cents per certificate for the work, so that nearly or practically all of it is for their responsibility. The book which purports to be a book kept by the Windsor Trust Company is a record of the original transfers [65] of the Tenabo Mining & Smelting Company made by the Windsor Trust

(Testimony of John Janney.)

Company. I cannot say just what we have paid this company at this time. There has been an employee who has kept the vouchers, a typewriter, bookkeeper or whatever you want to call her. Just a clerk. The amount we have paid her is \$100.00; that is also for a lot of typewriting, writing up those minutes and the correspondence of the company largely done by her. Her name was M. B. Robinson. When we open books in our office we have an expert bookkeeper come in. The directors never voted to open books. We have a copy, though, of all of the records. This M. B. Robinson was a clerk in the office of Locker & Janney. She was in our office five years and left, I think, in October last. I think I told her before she left the office to make a record complete of everything that she could see, whether the records balanced up or not. When a check was issued she would write out a voucher and pin it to the check, and when a check was sent through the voucher would be signed. She did that part of it.

We have made reports to the Attorney General of this State, one November 30th, 1910, and the statement of May 31, 1911. I have copies of these reports and of all made to the Attorney General. To the best of my belief these reports were mailed by Miss Robinson to the stockholders. There were about 250 stockholders, I guess. (Report admitted in evidence and marked Plaintiff's Exhibit 8.)

The report you hand me rendered in 1911 was in the same way mailed to stockholders and filed with the Attorney General and with the County Recorder.

(Testimony of John Janney.)

I don't know whether one was made before 1910. That was when I became a director. There is nothing in the minute-book which shows with reference to the statement of 1909. (Statement of May 31, 1911, admitted and marked Complainant's Exhibit "A.") A copy of Complainant's Exhibits 8 and 9 were mailed to the stockholders. I could not say as to whether I superintended the mailing of all of them. I am quite confident that Miss Robinson mailed some of them, and I remember taking a big bundle of them down once or twice. I have no doubt that she did some of the time mail some of the reports. I saw her writing them up and I am morally certain that they were mailed to all of the stockholders, subject to such oversight as anyone is liable to make in going over a list of stockholders. [66]

Mr. Hiram Tyree, Mr. Locker and myself were not the only ones who had the agency of this stock, because the agency was not given by the company. The agency was given by Mr. Locker and myself to sub-agents at the time we had contracts. I think you could consider the French contract as the bank being an agent from the company. The contract runs from the company to the bank. There was no other agency than those three, unless you call that 165,000 shares an agency. That was a submit for bids for the stock.

Now, if McCornick Bros. bid on that—if that is in fact the case, and you want to consider them as agents they are the agents—but I would say not. I would say there were none others than Mr. P. B.

(Testimony of John Janney.)

Locker and the French bank subject to the provision that Mr. Locker has associates and I know of none. (Various minutes of the Board of Directors found on pages 29 to 91 were offered and received in evidence.)

WITNESS.—A great many things have been discussed in meetings but everything that this corporation has finally adopted is there in that minute-book. The following resolution was discussed and threshed out but was never finally adopted.

“Whereas, large sums of money are being expended by P. B. Locker in the work of financing the treasury of this company by the sale of treasury stock in Paris, France, \$4,368.57 being the Windsor Trust Company bill for printing French bearing certificates, of which \$2,000 has been paid; \$1,310, \$610, \$410 bills for services of Vice-Presidents and Assistant Secretaries in signing 45,000 certificates; French taxes and dues approximating \$10,000 Trustee fee to Windsor Trust Company \$3,000; also attorney’s fees for legal advice in Paris, and sundry other incidental expenses; and

“Whereas, this company is not paying any part of these expenses but is receiving the benefit therefrom and is therefore interested in the success of negotiations which require expenditures of large sums of money on the part of said P. B. Locker, and

“Whereas, said Locker has advised this company that he can secure a loan from the French Bank upon his note, provided he can secure the issue of 50,000

(Testimony of John Janney.)

shares in French bearer certificates, and has asked for a loan of the same, offering to secure this company by 70,000 shares of stock of this company which is owned by him and associates; [67]

“Now, therefore, be it resolved that this company loan to the said P. B. Locker, 50,000 shares in French bearer certificates for a period of six months, upon the deposit by the said P. B. Locker with the Windsor Trust Company, to the credit of the Tenabo Mining & Smelting Company, as collateral security of 70,000 shares of stock of this, the Tenabo Mining & Smelting Company upon the condition that the consent to the loan of said 50,000 shares in French bearer certificates be obtained from Mr. Bernard Desouches, 148 Avenue Malakoff, Paris, France, and also from the members of the Underwriting Syndicate, with whom this company has contracts relating to the said stock; and

“Resolved, that this company authorize the payment of \$25,000 to the order of P. B. Locker from the money deposited in the Franco-American Banque to the credit of this company, for the sale of the first allotment of 150,000 shares of stock, not, however, until the entire allotment of 150,000 shares aforesaid has been paid for in full, and upon condition that the said Locker deposit with the said Franco-American Banque, 50,000 shares of stock of this company as requested, by five thousand French bearer certificates of the denomination of ten shares each, heretofore loaned to the said P. B. Locker by Tenabo Mining and Smelting Company, for the pur-

(Testimony of John Janney.)

pose of providing funds for expense, and so forth.

“Resolved that the Franco-American Banque be, and the same is hereby authorized and instructed to turn over to the order of P. B. Locker of the Hotel Chatham, Paris, France, and Mr. Bernard Desouches, party of the second part in a contract authorized by resolution adopted March 5th, 1910, five thousand French bearer certificates of the denomination of ten shares each, upon the deposit of the said P. B. Locker with the Franco-Americane Banque, or with the Windsor Trust Company of New York, or part with one and part with the other, a total number of shares which will aggregate 70,000, said shares to be deposited to the order of the Tenabo Mining and Smelting Company.”

Mr. Smith, as counsel of the company, drew this and advised us on it. I cannot tell why the board did not vote upon it. The matter may have been under consideration a few days, but it may have been longer than that. At [68] several meetings they discussed it. It was written on a loose sheet of paper and was, I think, afterward destroyed.

“Such a resolution was written up on a piece of yellow paper. The directors discussed it and Mr. Smith has spent a good deal of time in drawing it. I told Mr. Skeen that this resolution had been approved. A few days after that the whole board met with Mr. Skeen and it was explained to him that the resolution had never been finally adopted. It was something we had discussed and given careful consideration to, but is not anything we finally adopted.

(Testimony of John Janney.)

Everything that was finally adopted is there in that minute-book. I do not think that was a minute. I think there were two or three things all jumbled together on separate sheets. There was a minute of the board held on February 6th, 1911. There was some matter presented on a yellow sheet of paper for the meeting to consider. Whether it was written afterwards I could not say. We did not have our minutes written up in detail, putting down the date of the meeting and who were present before the meeting was called. I account for this particular sheet bearing date February 6th, 1911, by the fact that we might have had a meeting on that date. The meeting with the members of the board in Mr. Skeen's office, bearing upon these matters, may have been after Mr. Skeen had brought the original suit. That resolution was never finally adopted by the board. The board did meet and consider the resolution, and in the sense that when they considered it and talked about it, they acted on it. They did act upon the resolution and thrashed out the details of it and spent a good deal of time on it, and Mr. Smith, as counsel for the company, advised on it, he drew the resolution himself. It was never submitted to Mr. Skeen; it happened to be a piece of paper in the minute-book at the time he came into the office to examine it. When he was examining it he said to me: 'Is this one of the minutes?' and I said: 'That is a thing that has been passed upon by the board, or that is a matter that has been approved but never finally adopted.' I meant the form of it had been approved by Mr.

(Testimony of John Janney.)

Smith. The board considered it, but I do not think they ever voted on it. The terms of this resolution were first brought to the attention of the board sometime prior to that date, possibly a week or longer before that date, and [69] during that week they had thrashed out the terms of the resolution. The typewriting of it was done in my office, as the result of the action of the board, they having discussed it at several meetings and thrashed out its terms. The details of it had been agreed upon by the board at previous meetings. The board of directors is not in the habit of thrashing out and agreeing upon the details of resolutions and then not paying any attention to them after that. The sheet of paper upon which this resolution and these minutes were written, I never saw again after the 1st of March. I may have thrown it into the waste-basket. I have no recollection what became of it. No one told me to throw it away. No one of the board of directors told me to destroy it. It is not my habit or custom of taking resolutions that have been formally discussed at previous meetings of the board of directors and agreed upon in detail and write them up and then subsequently destroy such resolution. I did discuss the matter with Mr. Ferry and Mr. Smith informally after the resolution was written up. Mr. Ferry is president of the company, and without any directions from him or anyone else I destroyed this resolution. There was a meeting of the board on February 8th, 1911, relating to the Locker contract. I do not remember whether at that meeting there was any dis-

(Testimony of John Janney.)

cussion of this resolution. Mr. Locker and I are jointly interested in his work under the French contract. Nevertheless, I do not recall whether anything was said at the meeting of the board on February 8th bearing upon the matter of readjusting my relations with Mr. Locker whereby he was to obtain \$25,000.00 under the conditions set forth in the resolution." (Tr., pages 104-117.)

Saturday, Sept. 7, 1912, 10 A. M.

JOHN JANNEY, direct examination continued.

Our minutes were made up of detached leaves and sheets but the pages could not be changed around without showing there had been a change. The minutes of February 6th, 1911, showing the resolution which is above referred to, were prepared about that date. That was the date we had the minute meeting, I suppose, and the resolution was perhaps prepared before the meeting. Mr. Skeen came to my office and asked for the minute-book [70] and I handed him that book. On a yellow sheet put in that book along with some other things was this resolution. It was something about February 13th. Mr. Skeen called several times thereafter to examine the same book. I don't know whether the loose leaf was in the book. I see from the book that there is a meeting on February 8th and not another until May 3d, so the chances are that I did not look at or do anything with the minute-book between those dates. I remember Mr. Skeen calling at our office with Mr. Cramer to make a copy of the minutes of our meeting. I think it was along in April. Now

(Testimony of John Janney.)

at that time I handed Mr. Skeen our minute-book and I think it contained that piece of paper, the yellow leaf or sheet. Mr. Skeen may have come again to examine further the minute-book the middle of May. I do not recall. Skeen called at my office several times and each time I handed him the same book with the same papers in it. I remember calling at Mr. Skeen's office a number of times after the filing of this suit. I remember calling in company with Mr. Howard, Mr. Smith and Mr. Ferry, and meeting in Mr. Skeen's office Mr. Mallet and Mr. George Kimball, but could not say whether it was before or after the filing of the suit. At that meeting, Mr. Skeen made a statement referring to this resolution as though it had been adopted. He stated in effect to me that, in effect, at that meeting, that I had told him that resolution had been adopted. I said: "Now, Mr. Skeen, I am going to handle this matter vigorously. When you asked me that question I told you that that resolution had been approved, but it has not been finally adopted." These were my words.

I don't remember when I wrote up the minutes of the meeting of February 8th, 1911. We wrote up the minutes of the meetings generally before the meeting was held. We usually wrote up what business we wanted to submit to the meeting and then when we went to the meeting we considered that business. We would almost always prepare a resolution, so as to present the matter to the board in the form of a resolution. Then they had something definite and

(Testimony of John Janney.)

concrete to act upon and the proposition was presented in a way that it took less time to consider it. That was the usual method. I can give you no idea as to whether the minutes of February 8th, 1911, were prepared before or after the date they bear. I paid no attention to that loose sheet bearing the purported minutes of the meeting of February 6th. I couldn't remember anything about it. I might have left it in that minute-book six months. I might have thrown it into the waste-basket the last time [71] when Mr. Skeen saw it.

Q. Did you ever at any time state to Mr. Skeen or to anyone else interested in this litigation that the purported minutes of February 6th, 1911, were not copied into that book?

A. I do not remember, but I may have said it.

Q. Well, what is your best recollection, did you ever state it or not?

A. I do not remember any conversation on the subject.

Q. You never attempted to bring to their attention the fact that there had been any change in the record that you submitted to Mr. Skeen for examination, did you?

A. I would like you to make that question clearer, it is a little obscure. The ambiguity is whether I told Mr. Skeen that there had been any change in the record.

Q. Did you ever bring to his attention that the yellow sheet that you submitted to him was not still in the minute-book?

(Testimony of John Janney.)

A. I do not remember ever calling his attention to that, and I do not think I ever did. It is not my habit as secretary to eliminate from the record matters relating to important transactions, which have been considered by the members of the board, the details of which have been worked out by them and have been approved by them separately, so long as there is any chance of their ever becoming an act of the corporation. I did not consider it of any importance. (By-laws of the defendant corporation admitted in evidence and marked Complainant's Exhibit 10.)

WITNESS.—I have a copy of the prospectus that was issued in France, but have not the English translation of it. There are letters there about that particular prospectus. These prospectuses, which are the subject matter of consideration, and recorded in the minutes of Tenabo Mining & Smelting Company, on June 12, 1911. (Prospectus admitted and marked Complainant's Exhibit 11.) As secretary of the company, I have been informed to what extent Mr. P. B. Locker has exercised the authority given him by the Board of Directors in the power of attorney which has been recorded in the minutes. I have been informed by letter. Mr. Locker had an attorney in Paris write to the corporation. I gave you the letter yesterday. I have never made any personal examination to find out whether he has executed more contracts or any number of contracts under that power of attorney. I have reports here that will show to what extent he has proceeded. It would be

(Testimony of John Janney.)

impossible [72] for me to know the full extent to which he has proceeded.

Referring to the number of stock certificates: There appears to have been 15 volumes. "A" to "Q," inclusive, are all of the certificate-books that have been signed up and sent to the Trust Company. Two others were printed and are in the office in Salt Lake. I did not produce them here. The certificates were printed wrong and they have never been signed up, and were thrown aside in a lot of rubbish on a table with some other things and there they are. There are 250 certificates in each book. The form of certificate submitted is Exhibit 4, attached to the deposition of Mr. Ferry is the form that was used with an explanation, viz., that some of the certificates are printed with the number "100" lithographed in the blank space for the number of shares. I also want to add this: That the "Carnegie Trust Company" was printed in the first two books that this company has printed, on the left-hand margin. As well as I remember, about half of that book had printed in the body of them the number of shares, to wit, 100. They are there and the records will show. Referring to the stub No. 105, Book No. A: It was issued for 100 shares to Robert Murphy and registered by the Union Trust Company, July 26, 1910. I do not know when it was issued. The record does not show that. This information I am getting from the transfer agent and our registry agent. Referring to stub No. 107 (?), it shows that the certificate was not issued. It shows on the stub

(Testimony of John Janney.)

“Void. Not issued.” Referring to certificates 110 to 129, inclusive: I know the system of the Trust Company to be that a blank stub is considered by the Trust Company a ditto mark. Therefore, I suppose you can answer it that way. Now, I would like to make an explanation. These trust companies, instead of charging 5 cents for transferring one of these certificates, they could make these records so that they would have to charge 10 or 15 cents. They have gotten this matter down to a science. Referring to stubs 131 to 152, both inclusive: I cannot say whether these stubs disclose to whom or for what amount the stock was issued. The stub being blank amounts to a record that the stock was issued to Robert Murphy in the sum of 100 shares, referring to the last recorded stub. That is the method of the Trust Company in entering stock. I have no record in the office to this effect. Stubs 158 to 168, inclusive, do not disclose to whom and for what amount the stock was issued. [73] Same explanation. Also stubs 170 to 204, inclusive. From the stub, I would judge certificate 107 was issued to Otto Spa, but I would have no way of knowing except by reference to the Trust Company’s books. I would give the same answer to numbers 172 to 204, inclusive. I do not know of my own knowledge where or by what authority these certificates were issued to Otto Spa. Stock book B I would judge is one of those that I have at home, from the fact that it is not listed on the Trust Company’s certificates, and also the stock book marked “C.”

(Testimony of John Janney.)

I do not know where the certificates came from or whether there was in fact any certificates cancelled and surrendered, which formed the basis of the re-issuance to Otto Spa.

Referring to stub numbers 1039 to 1200, both inclusive, Book "D," I cannot state if these stubs disclose to whom or for what amount the stock was issued. They are in blank. I can look at the record of the Trust Company and tell, but as secretary of the defendant company I have no record to that effect.

Stubs 1456 discloses 500 shares issued to H. Tyree; stubs 1457 to 1460 both inclusive, are blank.

Referring to Book "E," stubs 1460 to 1500, both inclusive. They are in blank. Also stubs No. 1502 to No. 1750: Book "F": They are in blank. Referring to Book "G," stubs 1752 to 1950 are all in blank. Also 1957 to 1960. 1961 shows 4,000 shares but no date. Referring to Book "H," certificates 2002 to 2021, both inclusive, are subject to the explanation formerly given, and when I refer to this explanation, I refer to the records of the Trust Company. I regard the Trust Company as our agent. I have never asked for copies of these records until the time of this trial. We have never had any occasion for them. Stubs 2034 to 2036, both inclusive, are blank, and 2043 to 2141 all appear to be blank. 2143 to 2193 are blank. 2197 and 2198 are blank. 2200 to 2241 are blank. Also 2246 to 2250. It has been the custom for the President to sign the certificates in blank and they are put in charge of the

(Testimony of John Janney.)

Express Company and directed to the Trust Company. At whose request and upon whose order they are checked out depends entirely upon whose stock is going to be checked out. If it is company [74] stock, it is checked out on the order of the company; if some individual stock, it is checked out on the order of the individual who can present the certificate for transfer. There are two certificate books that I refer to above from which there are no certificates taken. These are the two certificate books I count as void. They are not usable. We have in the stock certificate books some certificates that have not been used.

Cross-examination by Mr. ASHTON.

I am now living and have lived at Twin Falls, Idaho, since 1906 or 1907. I was an attorney at law until I began with these mines. I am engaged now in developing mines; have been since 1907. I have been associated with this defendant company and I have been associated with the Tenabo Consolidated Mines Company and with two companies that have properties in Pioche, Nevada. I have known Mr. Locker since 1893. We were at college together from '93 to '96—college chums. Have been associated with him in the mining business. I think we began in 1907. The circumstances that attended our forming a relation was, I was in Mr. Locker's office on a personal visit, and at that time he was manager of one of the departments of the Continental Life. Mr. A. E. Raleigh came into his office to talk to him about a piece of mining property, and

(Testimony of John Janney.)

Mr. Locker said to me: "John, go out and talk with this man and see what you think of the proposition he has got." We did not at that time enter into a partnership. From that point it just drifted on. Our equal interests dictated and we proceeded to make a success of the mine if we could. We gave a lot of consideration to the question of how we should conduct our operations. We mapped out a policy where we tried to differentiate ourselves from any objectionable methods in this business, and we resolved that we would accept no salaries in companies where they were not on a self-sustaining basis, and that when we went out to promote the interests of the corporation by the sale of stock or otherwise, that we should act from the viewpoint of the stockholder, because of our interests in the stock, and that we would not accept commissions on stock sales. That was a policy definitely adopted. That policy persisted up to the time the Tenabo Mining & Smelting Company was organized. Then it was changed. Conditions in the Tenabo Mining & Smelting Co. were unusual and peculiar. The reason was this: In proposing the consolidation of these companies, Mr. Tyree [75] seemed to think that he was doing a work of value for his corporation and his stockholders, and he seemed to think that he would be accorded a commission or a promotion fee in stock, and that led to a contract between Mr. Tyree on the one hand and Mr. Locker and myself on the other, whereby it provided for that commission of stock. We merged the property of the Tenabo Con-

(Testimony of John Janney.)

solidated Mines Company with the property of other people who had different policies. The Tenabo Consolidated Mines Company controlled the Two Widows Claim, the Two Widows Extension Claim, the four Copper Hill Claims, and it controlled possessory option rights on the Nevada Phoenix Group of four claims. These properties were controlled and owned by corporations. I owned stock in the Tenabo Consolidated. I think Mr. Locker and myself owned 300,000 shares. The property owned by that corporation was turned in to the defendant corporation. No promotion fees or commission were allowed or asked for by Mr. Locker or myself. None was ever received. The 300,000 shares of stock that came from the Tenabo Mining & Smelting Company to the Tenabo Consolidated Mines Company in payment for their properties all went into the treasury of the Tenabo Consolidated Mines Company for the benefit of the stockholders. Those who were the first directors of the defendant company were H. P. Clark, C. S. Varian, Lester D. Freed, R. T. Badger and H. C. Edwards. We accepted no fees whatever for the consolidation, and at the time of this contract with Mr. Tyree, which provides for that fee, Mr. Locker and myself definitely and positively had a conversation on that subject. We decided we did not have to retain that, and could put it into the common fund, and by so doing could do more for our company than we could otherwise, and we definitely agreed at the time of that that what we got should go into the common

(Testimony of John Janney.)

fund. I am now referring to the Tyree contract filed in the case. Mr. Clark is President of the Merchants' Bank. Mr. Edwards and Mr. Varian are attorneys at Salt Lake City. Mr. R. T. Badger is cashier of the Utah State National Bank, and Mr. Freed is a merchant in Salt Lake City. This list of the first Board of Directors was submitted to the Board of Directors that considered this consolidation, but I do not know how they reached the agreement as to who should be the first board. I might have tacitly consented to the selection. I was away from Salt Lake, and I think these men were all selected when I got back, and I just asked Mr. Locker [76] who they were, and I might have talked a little about it, but I do not recall it. I didn't say anything to them about procuring the services of these men. There was some talk about the character of the men necessary for the new directorate. We decided under no circumstances would we consider a merger with these people unless we could agree upon a Board of Directors of responsible men that we could rely on. The object was to protect the stockholders. I believe they were all well calculated to do that work. At the time the first contract was made, called the Locker contract, I was not connected with the company in an official capacity.

Saturday, Sept. 7, 1912.

AFTERNOON SESSION.

JOHN JANNEY, redirect by Mr. SHANK.

I find the amendments to the by-laws, pages 32 and 86 of the minute-book. They are the only

(Testimony of John Janney.)

amendments. (The amendments to the by-laws as the same are found on pages 32 and 86 are offered in evidence.)

WITNESS.—You have given me entirely too much for the time I had. I went through the letters in the company file that Mr. Locker and I have; the letters that relate to the exercise of power of attorney. I won't say they are all, because necessarily in my hasty search I have done the best I could. I am sorry I have not been able to do more. I have examined the record to ascertain whether there was a report filed with the Attorney General since May 31, 1911, and I find no report. I don't know about Mr. Ferry's and Mr. Smith's record, nor about the Attorney General's. (List of certificates missing marked "Complainant's Exhibit 12.")

WITNESS.—The letter dated "Paris, November 29, 1910," is from Mr. Locker, who had power of attorney from the defendant company. I was secretary at that time. (Letter admitted and marked "Complainant's Exhibit 13.") A letter bearing date December 5th, 1910, is also from Mr. Locker. (Letter admitted, marked "Complainant's Exhibit 14.") This letter dated April 7, 1911, was received by me, through the mails, from Mr. Locker. (Letter bearing date April 7, 1911.) [77]

This letter is written on the letter-head of the company with French designation, Salt Lake City, U. S. A., then Salt Lake City in English, the Paris address and the cable address in Paris. The company had a letter-head in this country which were used

(Testimony of John Janney.)

in our communications in our work, and Mr. Locker used it in Paris. He had in his office for general use the letter-head of the Tenabo Mining & Smelting Company. Was received by me through the mails from Mr. Locker. (Letter bearing date April 7, 1911, marked "Complainant's Exhibit 15" for identification.) Letter from P. B. Locker to J. J. Janney, dated June 9th, 1911, marked "Exhibit 16." Letter from P. B. Locker to Tenabo Mining & Smelting Company, dated June 20th, 1911, marked "Exhibit 17." Letter from P. B. Locker to Mr. Janney, dated June 13th, 1911, with telegram in French attached, marked "No. 18." Letter from Mr. Locker to Mr. Janney dated July 7th, 1911, marked "No. 19." Letter from Mr. Locker to Mr. Janney, dated July 11th, 1911, marked "No. 20." Copy of purported receipts dated July 6th, 1911, marked "No. 21." Letter from P. B. Locker to Tenabo Mining & Smelting Company, dated July 11th, 1911, together with three sheets attached thereto, marked "Expenses incurred by P. B. Locker," marked "No. 22." Letter from Mr. Locker to the Tenabo Mining & Smelting Company, dated July 13th, 1911, marked "No. 23." Letter from Mr. Locker to the Tenabo Mining & Smelting Company, dated July 13th, 1911, marked "No. 24." Letter from Mr. Locker to Mr. Janney, dated July 18th, 1911, marked "No. 25." Letter dated July 25th, 1911, from Mr. Locker to Mr. Janney, marked "No. 26." Letter from Mr. Locker to Mr. Janney, dated August 8th, 1911, marked "No. 27." Letter from Mr. Locker to Mr. Janney, dated

(Testimony of John Janney.)

August 22, 1911, marked "No. 28." Letter from Mr. Locker to Mr. Janney, dated October 23, 1911, marked "No. 29." Letter from Mr. Locker to Mr. Janney, dated October 23, 1911, marked "No. 30."

WITNESS.—The letter which purports to be a copy of a letter written to Mr. P. B. Locker under date of November 19th, 1910, is a copy of a letter written by me on that date. (Letter marked "Exhibit 31.") The original of this letter was sent to Mr. Locker. He is in Paris. (Letter written by Mr. Locker to Mr. Janney, dated April 12th, 1912, marked "No. 32.") That is Locker's signature, and W. Mont Ferry is President of this company. Letter written by Mr. P. B. Locker to W. Mont Ferry, of April 11, 1912, marked "No. 33." [78]

WITNESS.—I was not present when Mr. Ferry received such a letter as that. Neither was I present when it was written by Mr. Locker.

Cross-examination (Resumed).

(What purports to be agreement between the company and Mr. Locker, marked Defendant's Exhibit "A.")

WITNESS.—The Board of Directors passed a resolution authorizing the execution of a contract between itself and Mr. Locker. At page 8, the minutes of the Board of Directors, under date of January 7th, 1909, reads:

"Whereas, negotiations have been pending with brokers of New York City and Boston, wherein it appears that a sale of 600,000 shares of the treasury

(Testimony of John Janney.)

stock of this corporation can be made, and whereas, it is the opinion of this Board of Directors that it is to the best interests of this corporation to grant an option for the sale of 600,000 shares of the treasury stock of this corporation to P. B. Locker of Salt Lake City, Utah, with full power to assign to others that he may desire: Now, therefore, be it resolved, that this corporation do grant an option to the said P. B. Locker, or assigns, to purchase 600,000 shares of the treasury stock of this corporation, at the price of 15 cents per share for the first 400,000 shares, and 20 cents per share for the remaining 200,000 shares, making a total of \$100,000 for 600,000 shares of the treasury stock, payable as follows: "The sum of twenty thousand (\$20,000) dollars to be paid to this corporation on or before the Tenth day of April, 1909, and the further sum of five thousand (\$5,000) dollars on the first days of the months of May and June of said year, and the sum of ten thousand dollars (\$10,000) per month on the first days of July, August and September, and twenty thousand (\$20,000) dollars per month on the first days of October and November, 1909, making the full sum of one hundred thousand (\$100,000) dollars.

"Said contract to provide that time is the essence of the same, and in the event said Locker or his assigns fail to make any of said payments, as therein provided, then said option will immediately cease and terminate, and the said Locker or his assigns to lose all rights to purchase said stock under the

(Testimony of John Janney.)

provisions of said option; Provided, however, that the said Locker, nor his assigns, nor either of them shall incur any indebtedness or [79] liability of any kind against this company or its property.

“Provided, however, the Board may extend time of payments if it so desire, and the President and Secretary of this corporation are authorized and directed to execute immediately on behalf of this corporation such contract as will carry this resolution into full force and effect. Said contract to provide that the said Locker, or his assigns, is to cause a market to be made upon the ‘Curb’ of New York and elsewhere, as may seem best, giving market quotations of the stock of this corporation, and said contract to provide further that the stock books of this corporation shall be signed by the President and the Secretary and forwarded to the Carnegie Trust Company of New York City, with instructions to deliver treasury stock to the order of said Locker, or his assigns, in such amounts as may be called for, upon the payment to the said Carnegie Trust Company of the sum of 15 cents per share for the first 400,000 shares and 20 cents per share for the last 200,000 shares of the 600,000 shares covered by this option, the same to be placed to the credit of this corporation for its use and benefit.

Said resolution was seconded by Mr. Badger and being put to a vote was unanimously adopted.”

WITNESS.—An agreement was made in writing by which I became the assignee of an interest in this contract. Defendant’s Exhibit “B” is a signed copy

(Testimony of John Janney.)

of that agreement between myself, Mr. Tyree and Mr. Locker, two thousand two hundred shares of stock were issued pursuant to the terms of the contract marked Defendant's Exhibit "A": To Charles C. Wilson, 500 shares; John R. Nettlestrom, 200 shares; Ralph R. Phelps, 500 shares; same 50 shares; 50 shares to H. R. Page; C. R. Wilson, 500 shares; Ernk Le Pelly, 100 shares; L. H. Ranking, 300 shares. Remittance was made to the defendant corporation for these stock certificates. There was a remittance of \$1,425.00 and another of \$262.50. That is all the stock that is issued under the first contract. There has been other stock sold which is represented here on the minutes. The difference between that list, if I had it here, and that list, would be between what is sold and still undelivered. Some sales or contracts have been made with reference to stock, certificates of which have never been issued by the corporation. (Witness reads list.) That leaves approved by the Board and [80] not issued, the following: Perry, 100 shares; Pettit, 100 shares; Crandall, 10 shares; Newcomb, 100 shares; Olsen, 500 shares; Auerbach, 100 shares. These last named are charges upon the company in the form of treasury stock which is unissued but authorized. The first remittances that we made from Chicago were at the rate of 75 cents a share. There was some conversation between me and Mr. Locker. I returned to Chicago about the 15th day of March and I had been down to New York to adjust a matter with the Trust Company there, and when I returned to Chicago, I

(Testimony of John Janney.)

met Mr. Locker in the hotel and asked him how he was coming along with his work and he told me that he had gotten a very good start and had very good prospects, and then he said to me: "John, we cannot sell this stock at 75 cents and turn 15 cents into the company; we cannot do that." There started a conversation which resulted when we made our first formal statement to the company of our work and remittances, led us to writing a letter to the company in which we explained the situation we were in. Then a question was as between us and the company, and we decided that we had a perfect right to buy this stock at 15 cents per share. As far as the company and ourselves were concerned, the transaction was all right, but when we sold that stock to other people, a contractual relation arose between us and them and we found it was absolutely impossible to sell the stock unless we answered the question about its being treasury stock. The purchaser of the stock would say: "Is this treasury stock," and we would say "Yes," and immediately there was a contract between us and the man that the money would go into the treasury of the company subject, maybe, to a reasonable commission, and we did not want to split halves on that, so we decided to go back to our original plan of selling stock, and not to leave ourselves entirely free from protection in it—we wanted our expenses paid. At the time Mr. Locker made his contract with the company, we did not know of any market in which we could sell the stock at 75 cents a share. We had a general idea of a lot of different

(Testimony of John Janney.)

lines that we could carry out, but didn't have any definite idea where to do it. It was very difficult to sell in 1907, 1908 and 1909. When the panic of 1907 came on, it seemed to absolutely put a damper on that kind of business, and at the time the Locker contract was made, identified as Exhibit "A," we had absolutely nothing definite to go on, [81] and we had to create a market for the stock. The letter which was directed to the corporation, we wrote to Judge Varian, attorney for the company. This letter was dictated by myself and written by a typewriter in our room in the hotel in Chicago and signed by Mr. Locker. I do not know whether Judge Varian ever received the letter. Defendant's Exhibit "C" is another letter of the same date addressed to Hon. C. S. Varian, Utah Savings & Trust Building, Salt Lake City, Utah, and bears upon this matter. (This letter, directed to Mr. Varian, identified as Exhibit "C," was read.) It was dated April 16th, 1909.

There was a letter written to Mr. Varian bearing the same date as the one identified as Exhibit "C." That letter was dictated at the same place and under the same conditions as the other. Mr. Locker may have been there when it was dictated. He afterwards saw it and signed it and I saw him sign it and it was sent to Mr. Varian. I know Mr. Varian received it. When I went to his office to get the other letter, he produced a copy of this letter. He would not let me have the original, but made me a copy. (This copy is marked Defendant's Exhibit "D" and

(Testimony of John Janney.)

is admitted in evidence.)

Complainant's Exhibit 3 is a statement of expenses compiled by Mr. Locker on account of the Tenabo Mining & Smelting Company. The letter designated as "Exhibit 3" refers to another statement. This letter of July 12th shows that Mr. Janney "immediately left for Salt Lake City, and will in person make a full explanation of conditions as they now exist. We had a fuller statement than this and presented it to the board. There had been a good deal of trouble ever since we wrote that letter from Chicago and there seemed to be a misunderstanding somewhere that we could not get at, so I appeared before the board and explained to them how it was that in selling this stock we met with these conditions, and what the conditions were. These conditions were that we could not sell stock. I told them I was very anxious and very willing to go out and make a commission on a thing if I could do it legitimately, that the thing was in such a state and he had gone to so much expense that I was willing to do it, if the thing could be done in a satisfactory way and I had started out with that idea. I started with that contract with Mr. Tyree and Mr. Locker with the idea of making a commission. Now, when we [82] got to the time of selling the stock, we simply saw we could not sell the stock under the conditions—it was so hard to sell that we had to make every inducement to the purchaser to buy, and therefore I explained to them we could not work without a commission. The board took action on the matter covered by my

(Testimony of John Janney.)

statement, and the statement made by Mr. Locker, referred to in Exhibit 3. It passed a resolution on the 19th of July, 1909, appearing at page 14, as follows:

“Minutes of Tenabo Mining & Smelting Company meeting held pursuant to due notice, July 19th, 1909. Present: H. P. Clark, C. S. Varian, H. C. Edwards, and R. T. Badger The board listened to a report of Mr Janney regarding the plans of himself and Mr. Locker, with regard to disposal of treasury stock. Upon motion, it was unanimously resolved that P. B. Locker and J. W. Janney be and they are hereby appointed the agents of this company with authority to sell for cash at not less than fifty cents per share, the remainder of the treasury stock of this company yet unsold of the block of 600,000 shares which was by contract of the 14th of January, 1909, with the said P. B. Locker, authorized to be sold, being about 410,000 shares; subject to and in pursuance of the conditions of the contracts of this company with the Union and Windsor Trust Companies of New York, the stock so sold pursuant to this resolution to be registered and held for delivery in accordance with said instructions, and all of the money for which said stock is sold to be paid into the Windsor Trust Company subject to the order of the Tenabo Mining & Smelting Company. The authority to sell hereby conferred upon said Locker & Janney is limited to a period of sixty days from the 19th day of July, A. D. 1909, after the expiration of which time, said authority is to be considered revoked without fur-

(Testimony of John Janney.)

ther action of this board; and further it is expressly provided that no commissions or other compensation for their services are to be received by, or paid to, said Locker & Janney, or either of them, in any of the premises; but, that this board may in its discretion allow and pay such reasonable sums for expenses actually incurred by said parties in selling the said stock, as the board may determine to be equitable and just. Upon motion, meeting adjourned. Signed R. T. Badger.”

WITNESS.—The instrument marked “Complainant’s Exhibit 2,” signed by H. [83] Tyree and myself, never became the basis of the turning over of the Gem Consolidated properties and the properties of the Tenabo Consolidated. That contract was deviated from entirely; completely abandoned. No performance whatever, from either side was made under it, and when the consolidation of the properties of the two companies was effected, it was without any regard whatsoever to that instrument, or any oral understanding like it. The Gem Company received 450,000 shares, while the agreement mentioned provides that the Gem Company should receive 400,000 shares, and the Tenabo Consolidated Company received the same. 300,000 shares is the sum provided in the contract. You see, this contract provides that the Little Gem Company shall receive 400,000 shares and that the Tenabo Company shall receive 300,000 and that there shall go into the treasury of the company, 500,000 shares. Now, when the deed was consummated, there went into the treasury

(Testimony of John Janney.)

750,000 shares and the Tenabo Company got 300,000 shares and the Gem Company 450,000, which rubbed out the amount provided here in this contract for 100,000 shares, and also 200,000 shares to be as a profit to Mr. Locker, Mr. Tyree and Mr. Janney in the promotion of the consolidation. There was no commission when the consolidation was effected. There was nothing that went to Mr. Locker and nothing that went to myself. Everything went into the treasury of our company that we got out of this consolidation deal, and I will say that was our intention of what to do with the commission appropriated to us in this contract here.

The letter purported to have been received by Mr. Badger, the Secretary of the company, was delivered to me by Mr. Badger along with these other papers of the corporation. The signature to it is Mr. Locker's. (Letter admitted and marked Exhibit "E" and read.)

I was not a member of the Board of Directors at the time the second arrangement was made for the sale of treasury stock by Mr. Locker. No sales have been made pursuant to that resolution. The statement presented by Mr. Locker aggregating about \$3,000, to which reference has been made above, is a statement of the expenditures of money by Mr. Locker on account of the reports and examinations of certain engineers, the incorporating of the company, certain fees. (This statement admitted and marked Defendant's Exhibit "F.") Some of the items mentioned in Exhibit "F" were contracted during the

(Testimony of John Janney.)

life [84] of the first contract between the company and Mr. Locker. For instance, incorporating fees and those things. Also, the McVichie report, \$330.55—that is the expenses of the examination. The Hobbs examination, \$158.00. Here is an item of labor, A. E. Raleigh, \$600. I don't know when that was, whether before the contract or afterwards. Trust company's fees (shown in the exhibit) were after the incorporation of the company and after the execution of the contract. Here is a statement of \$1,199.00 expenses during a period of time which was prior to the execution of the contract, except for about one month—except for about \$100.00. I don't know whether or not Mr. Locker paid out the moneys set forth in this statement in behalf of the corporation. He did this business so loosely that I don't know whether you would say paid it on behalf of the corporation or not. He did anything to make the thing a success and make it go along. If it needed anything he did it, paying—work upon the claims and things like that, it was very loose business. I would not say he paid them out on account of the company; I don't know. He didn't send a statement of these to be reimbursed. He sent a statement of these expenses for the purpose of showing to what extent he was going to accept the commissions under that contract. The only items in here that were really claims against the company was an item of a state fee for incorporating the company; the McVichie examination, the Hobbs examination, the Tenabo taxes, and printing and office expenses.

(Testimony of John Janney.)

They were matters that he did not present a bill to the company for. It was just simply to show outlays which he wanted to get back. This was not a bill presented to the company. It was accompanied by a letter to Mr. Badger at the time that he took out a part of the commission under the contract—a statement of expenses which he sent along with it. It was not sent to Mr. Badger with the other papers attached to each other, constituting Plaintiff's Exhibit 3. I sent it, but I cannot say exactly as to the time. It was pinned to the letter when the thing began and it has gotten so mixed up I could not say. I don't think it was that letter, though, because there is another expense account pinned to it. Subsequent to the date of the second arrangement referred to in the last minutes, there is a payment of \$50 to Mr. Locker. It was on account. He received three payments at the time of the first remittances he made from Chicago, and that was the time he sent that expense account, to [85] show that those payments were covered by expenses. But he received only \$50 after the second arrangement, which was on July 19th, 1909. There were two payments made to Mr. Locker in April and May, 1909—\$1,140 and \$210. The \$1,140 item just referred to is the amount to which he was entitled under his first contract for the sale of 2,200 shares of stock. Referring to the method of the corporation in keeping its accounts and how they have been kept, what papers or instruments or entries have been made, with a view to keeping track of the company's business and affairs, I could say

(Testimony of John Janney.)

the money received by the company was deposited in the bank. There were no entry books except the vouchers. The vouchers show an item of receipt by the company as well as an item of output by the company. If the company received April 20th, \$1,125.00, there should be a voucher which shows where the money came from. Whoever is keeping the records and books of the company would make that voucher. To tell whether that has been done, I would have to look up the vouchers. This was at the time Mr. Badger was Secretary of the company.

Monday, Sept. 9, 1912, 10 A. M.

Redirect Examination—JOHN W. JANNEY.

Some of these letters (Exhibits 16 to 33), not those of a personal nature have been submitted to the Board of Directors of the defendant corporation. I couldn't pick out those which have. These letters marked for identification are not kept by me in the files of the Tenabo Mining & Smelting Company and I produce them in court because I asked Mr. Shank if he wanted my personal letters and he said he wanted them all. My personal letters are here. I took those letters out of the part of my personal file that has "T." Now, in my personal file I keep the letter of Mr. Locker with Pioche in "P" and Tenabo in "T." They came from a file marked "Locker." They were all received by me when I was Secretary. The company was interested in this business—they were personal letters. I couldn't answer the question and say whether they were received by me as Secretary. They were all addressed to me, 105

(Testimony of John Janney.)

Mercantile Block, Salt Lake City, Utah, and all of the letters addressed to the Tenabo Mining & Smelting Company were in the company's files. None of them were addressed to the Tenabo Company, except one of them in there addressed to W. Mont Ferry, President, which was taken out of the company's files at the request of Mr. Shank. He got a copy from my personal file and [86] asked if I had the original of that. That is the only letter in there addressed to the company and that letter came out of the company's files at Mr. Shank's request. These letters have never been in the company's file.

"It has been the habit of Mr. Locker when communicating with the company on company matters to address me personally and have me take up the matter with the Board of Directors. Mr. Pickard was Mr. Locker's attorney. Letter from Pickard with sheets attached, addressed to John Janney, under heading Tenabo Mining & Smelting Company, was put in the office files and regarded as a company letter. Offered in evidence marked Exhibit 34."

Mr. Pickard is Mr. Locker's attorney and attorney for the Underwriting Syndicate. The letter handed to me I received from Mr. Pickard and there was attached to it the sheets that are attached to the letter. It was received by me and addressed to me and at the heading of it "Tenabo Mining & Smelting Company" and put in the company's files. The contract admitted and marked "Complainant's Exhibit 35" is one of the contracts that was made by Mr. Locker. "That is the one that is referred in Mr. Pickard's letter."

(Testimony of John Janney.)

And the writing which purports to be an agreement entered into August 30, 1910, between the Windsor Trust Company, first part, Tenabo Mining & Smelting Company, second part, and Le Banque Franco Americane, third party, and the several stockholders of all Stock Trust Certificates, fourth parties, is a contract that was entered into by Mr. Locker pursuant to the power of attorney. (Contract admitted and marked "Complainant's Exhibit 36.")

I have a copy of the contract that is supposed to be a supplement to the Desouches Contract. (This is attached to Exhibit 35 as a part of that exhibit.) I have a copy of the contract executed between the company and J. H. Coleman, which is not signed. It was executed, I feel safe in saying, and has not been abrogated, as I understand it. The securities of this company have been passed upon by the French authorities who have jurisdiction over those matters. They have been admitted to France, and that contract with Mr. Coleman is, as I understand these matters, in a way, in abeyance, namely this: The contract between this company and the banker provides for an underwriting contract. That is to say, the banker agreed "to take firm," as they express it in France, a certain number of shares, [87] and we issued security from the bank as to that firm taking. That security was furnished in the form of an Underwriting Syndicate. Now, the Underwriting Syndicate contract contemplates that these securities shall be issued in France to the public, and the underwriters who have put up certain sums of

(Testimony of John Janney.)

money in the form of advances to fulfill this guarantee will receive a certain profit in the way of commission or increase. As I understand, the fulfillment contemplates the floating of the securities, which has never been done, and these underwriters have not put out this stock to the public, but they have divided this company money under this contract. I have no writing abrogating this contract. I suppose I could say that the company is acting under this contract. (Contract admitted and marked "Complainant's Exhibit 37.")

"We have been acting under that contract. It has not been abrogated. The securities of this company have been passed upon by the French authorities. The security was furnished in a form of an underwriting syndicate. The contract with that syndicate contemplates these securities shall be issued in France to the public, and the underwriters who have put up certain sums of money in the form of advances to fulfill will receive a certain profit in the way of a commission. They have divided this company's money under that contract. The company is acting under that contract now."

I have a contract executed by my company with George Kroll. I am told that contract is not being operated under by the company.

Cross-examination.

There is no money paid out by this corporation except through checks or debit slips, which are kept by the bank. When a check is sent to anyone, a voucher is kept, which represents a receipt. The

(Testimony of John Janney.)

cancelled checks and the stubs of the check-book constitute the original record of the corporation, and **the corporation** is now in possession of all those returned checks and accompanying vouchers. The bundle which Mr. Ashton hands to me, which purports to be checks, are the checks drawn upon the deposit of the company in the Utah National Bank, and they represent all payments made by the corporation between the dates shown on the first and last checks. The first check [88] is April 21, 1909, and the last, December 6, 1911. Entered by us in this book (referring to book) is an account which shows the amount of each check, the person to whom paid and the date when paid. This book is the book which accompanies the check. It has entered the name of the payee; it has a memorandum column to state what paid for, and it has a column for the amount and a column for the date, and that book contains a statement of each company or individual to whom a payment has been made during the life of the corporation. Besides the checks exhibited above, there are checks of the Merchants' Bank and Walker Bros. Bank. This other series of checks you hand me are the checks of the Merchants' Bank, and the book which has been exhibited shows the names and the persons and the dates when each of these checks was drawn on the company funds. There are one or two of these that have no voucher, but the checks show, and I have vouchers here that cover, \$1,180.00. The checks cover \$1,452.18. The book offered in evidence reads as follows:

(Testimony of John Janney.)

Date.	In Favor of.	In Payment of.	Check No.	Amount Check.
1909.				
4/21.	P. B. Locker.	Com.	01	\$1140.00
5/12.	P. B. Locker.	"	02	210.00
5/14.	Robt. Hogan, Treas.			
	Lander Co. Nev.	Taxes 1908	03	70.23
"	" " "	" 1908	04	81.09
6/14.	" " "	" "	05	1.00
7/3.	C. S. Varian.	Expense, Telegrams, etc.	06	15.55
9/16.	V. M. Ramie, Jr.	Bill Litho.	07	3.75
10/22.	McC. & Co. Bank of Austin, Ne.	Rec. Deeds	08	6.65
11/29.	C. S. Price.	Fees & Expenses patenting Widows Mine	09	160.30
	McCornick & Co.	Note Reliance Mng. Co. 10/5/7 15,000 and int. 3860.00	10	18860.00
	H. C. Edwards.	Atty. Fees and salary	11	1025.45
	C. S. Varian.	Atty. fees and salary	12	700.00
	R. T. Badger.	11 months' salary	13	550.00
	Lester D. Freed.	Do.	15	550.00
	H. P. Clark.	Do.	14	550.00
	Robt. Hogan Treas- urer Lander Co., Nev.	Taxes 1909	16	81.15
11/29.	Utah Litho. Co.	Expense	17	107.50
12/2.	George Weston.	Advance a/c. ass's work on Co.'s property.	18	200.00
12/6.	Utah Litho. Co.	1500 Stock cdfs.	19	80.00
12/13.	George Weston.	Assessment work on property	20	319.00
[89]				
12/21.	H. P. Clark, Pres.	Do to Geo. Weston.	21	481.00
12/29.	C. S. Varian.	Atty. Sal. Dec. 09.	22	50.00
	R. T. Badger, Treas.	Do.	23	50.00
1910.				
Jan. 6.	Geo. Weston.	Bal. Asst. Work.	24	1.55
	McCornick & Co.	Attys. lien on escrow papers from E. B. Carstall	25	75.00
				<u>\$25369.22</u>

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Date of Deposit. 1909.	Amount of Deposit.	Balance.
April 20th.	1425.	285.
May 11.	262.50	
Nov. 20.	24551.40	
	26238.90	869.68

Date. 1910.	In Favor of.	In Payment of.	Check No.	Amount Check.
1/12.	R. L. Polk & Co.	(Expense) Bill rend (Not issued)	26	-0-
1/25.	Bank of Austin, Nev.	Ex. recording Deeds	27	1.00
1/25.	Bert Acree, Recorder.	Do.	28	38.45
31.	R. T. Badger, Treas.	Salary, Jan. 1910.	29	50.00
	C. S. Varian.	Do.	30	50.00
2/4.	N. Y. Dft. Windsor Trust Co.	a/c. telegrams	31	2.45
9.	Yourselves Mt. N/B.	Wires, telegrams per list.	32	10.54
9.	Mt. N. Bank.	Exp. Chgs. to N. Y. Stock Banks 1/9/10.	33	2.00
	Do.	12/31/09.	34	1.75
11.	Bert Acree, Recorder. Lander Co., Nevada.	Rec. Deed Rec. Deed 4.75	35	Void -0-
11.	Bank of Austin, Nev.		36	2.75
11.	Telegram	Tel. to—— deducted from a/c. by Bk.	No. ck.	.75
15.	W. D. Armstrong.	Assessment work Rel. Co.	37	144.00
15.	A. E. Raleigh.	Do.	38	256.00
3/4.	J. W. Edmunds.	Auditing accts.	39	25.00
3/8.	Kelly Company.	2 Stock Ledgers	40	6.00
8.	Breeden Off. Supply Co.	1 minute book	41	3.50
8.	Utah Litho Co.	2000 ctfs.	42	110.00
23.	P. B. Locker.	Pmt. on a/c.	43	550.00
28.	E. O. Howard.	Salary	44	50.00
28.	W. Mont Ferry.	"	45	50.00
28.	Jno. Pingree.	"	46	50.00
28.	Benner X. Smith.	"	47	50.00
28.	Jno. Janney.	"	48	50.00
28.	Bank of Austin.		Void	
28.	Jno. Janney.	Tel. & Exp.		15.20

Date.	In Favor of.	In Payment of.	Check No.	Amount Check.
3/29.	Benner X. Smith.	Atty's. fee	51	150.00
3/19.	John C. Tyree.	Labor	52	50.00
19.	Century Prtg. Co.	Letter heads	53	5.00
6/1.	Union Assay Office.	Assaying	54	8.10
1.	H. P. Clark.	"	55	3.00
11.	Postal Tele.	Cables & Tels.	56	14.06
17.	Windsor Trust Co.	For list of Stockholders	57	10.00
10/5.	Century Ptg. Co.	Reports & Env.	58	20.50
11/11.	Robt. Hogan, Tax Re- ceiver.	Taxes, 1910	59	28.50
11.	Postal Tele. Co.	Telegrams	60	4.45
12/29.	"	"	61	75
29.	Century Ptg. Co.	Reports & Env.	62	12.00
1911.				
Mar. 9.	" " "	" " "	63	14.00
9.	W. U. Tel. Co.	Telegrams	64	2.60
9.	Postal " "	"	65	10.34
9.	Kelly & Co.	2 Let. files	66	1.00
4/19.	Postal Tele. Co.	Telegrams	67	4.07
19.	W. U. " "	"	68	1.85
May 9.	Grocer Ptg. Co.	Let. hds. & Env.	69	7.25
June 11.	Sec. of State of Ne- vada.	Copy of Order of Court	70	2.40
Dec. 6.	H. C. Edwards.	Court fees for Clerk	71	10.00
	Date of Deposit.	Amount of Deposit.		Balance.
1910.	Brot. Ford.	\$ 869.68		
Mar. 16.		1000.00		
		<u>1869.68</u>		
				1007
				282
				42
		In Account with Merchants' Bank.		
1910.				
Dec. 17.	Cashier's Check to A. E. Raleigh.	Assessment work		400.00
17.	A. E. Raleigh.	" "		300.00
1911.				
1/6.	" " "	" "		200.00
1/6.	Cashier's Check to J. W. Wade.	P. B. Locker a/c		50.00
18.	A. E. Raleigh.	Assessment work		200.00

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Date.	In Favor of.	In Payment of.	Check No.	Amount Check.
24.	Merchants' Bank. (W. H. Sherman).	Expense a/c Abstracts		4.90
2/8.	Jno. Janney, Secretary.	4 mos. salary (a/c off. exp.)		200.00
8.	Tel. to Arthur Jones.			1.25
8.	W. H. Shearman.	Legal fee		20.00
4/7.	A. E. Raleigh.	Location 28.00 Rec. 2.00	1	30.00
7/3.	Wells, Fargo Express Co.	Express on stock books	3	6.30
5.	Postal Tel.	Telegrams & cables	4	10.03
5.	Stephens, Smith & Porter.		5	30.85

[91]

Date of Deposit.	Amt. of Deposit.	Balance.
1910.		
Dec. 17.	1500.00	
1911.		
Feb. 8.	1.25	47.92

Date.	In Favor of.	In Payment of.	Check No.	Amount Check.
11/18.	W. H. Shearman.	On prom. note	01	712.50
24.	Postal Tel. Co.	Telegrams	02	26.32
28.	Walker Bros. Bank.	Check book	03	1.50
29.	W. U. Tel. Co.	Telegrams	04	25.83
Dec. 1.	Windsor Trust Co.	Transfer fee, etc.	05	406.90
6.	Skeen & Skeen.	Tyree labor (1909)	06	250.00
7.	" "	Int. Tyree Labor a/c 1909	07	25.00
11.	A. E. Raleigh.	Labor	08	100.00
18.	N. B. Robertson.	Clerical serv.	09	100.00
20.	A. E. Raleigh.	Labor	10	500.00
21.	Century Ptg. Co.	Printing	11	3.25
22.	Utah Nat. Bank.	Overdraft	12	7.18
1912.				
Jan. 2.	Union Trust Co.	Registering stock	13	375.00
15.	A. E. Raleigh.	Labor	14	200.00
Feb. 29.	" " "	"	15	150.00
Mar. 5.	Postal Tel. Co.	Telegrams	16	5.92
Apr. 1.	W. U. Tel. Co.	"	17	28.75
11.	" " " "	"	18	7.23
17.	A. E. Raleigh.	Labor	19	171.40
May 9.	Stephens, Smith & Porter.	Attys. fees.	20	500.00

(Testimony of John Janney.)

Date.	In Favor of.	In Payment of.	Check No.	Amount	Che
11.	Edith Shearman.	On prom. note	21	250.	
17.	A. E. Raleigh.	Labor	22	387.	
27.	" "	"	23	412.	
June 7.	Western Union.	Telegrams	24	15.	
26.	W. Mont Ferry.	Directors fee	25	150.	
28.	John Pingree.	" "	26	150.	
July 5.	E. O. Howard.	" "	27	150.	
9.	Walker Bros. Bank.	Telegram	28	1	
20.	John Janney.	Directors fee	29	150.	
					5263.

Date of Deposit.	Amount of Deposit.	Balance.
1911.		
Nov. 17.		
1912.	2900.	
Mar. 27.	2887.18	
May 24.	34.82	
July 15.	724.65	1283.61

[92]

The checks purporting to have been drawn on the Walker Bros. Bank were drawn against the company's funds. I think we have all the vouchers, accompanying them, here. (Checks on the Utah National Bank are marked Defendant's Exhibit "G"; Merchants' Bank checks, Exhibit "H"; and Walker Bros. Bank checks, Defendant's Exhibit "I.")

WITNESS.—Now, I would like to say that all of these checks added up and deducted from the amount the corporation has received gives me the balance in the bank. I went over them last night. I have no book or memorandum which shows the source of income of the defendant. The company has received two remittances from Mr. P. B. Locker under his contract. They are accompanied by a letter from him. These are on file.

When I left Salt Lake last November, I went east

(Testimony of John Janney.)

expecting to visit my family and be gone only a short time. I was away eight months. There was a lull in the company's business. There was nothing particularly to call me to Salt Lake, and there were things which seemed to come up which made it worth while for me to be in the east. I had occasion to see the Windsor Trust Company. It is not drawing anything from this company now. The lawsuits had a great deal to do with the lull in the company's affairs. Then, there was an article that came out in a New York paper that I think I would have gone from here to New York to see about that, that did the company injustice, and should be looked after. Again, Mr. Locker wasn't paying the Trust Company for their services under their Trust Agreement, and they didn't exactly understand why, and I wanted to explain that to them; and now they seem to be waiting in perfect willingness for Mr. Locker. All these things related to the interests of the company in an indirect way and were engaging my attention in New York and in the east, and I considered them very important. By a "lull" I do not mean the company's interests were not being cared for nor its business affairs neglected.

The attorney's fees to Mr. H. C. Edwards, to which I refer in my testimony in main was in connection with the McCornick mortgage. That bill was for the foreclosure of the mortgage upon the Gem property. The instrument marked Defendant's Exhibit "J" is a note in the sum of \$15,000, purporting to be signed by the officers of the Reliance Mining &

(Testimony of John Janney.)

Milling Company, which was a [93] lien upon the Gem property at the time this corporation took the Gem property over. (Exhibit "J" admitted in evidence.) The document marked Defendant's Exhibit "K" is one of the papers I found among the vouchers turned over by Mr. Badger.

"Respecting my direct testimony relative to a certain block of 66,000 shares of stock having been sold." I took the payment from the Franco-American Bank and estimated from the contract what that would offset. I have it figured out here as 63,000 shares, less 30,000 shares deposited in the Windsor Trust Company, leaving 33,000 shares net, is what I would estimate as what the company's contract with the Franco-American Bank entitles these underwriters to for these payments we have made. You see, Mr. Locker and myself have deposited in the Windsor Trust Company 30,000 shares to the company. The contract with the company provides that we shall indemnify them for over and above 50 cents a share, and that was the purpose of depositing 30,000 shares of our own stock. For the 30,000 shares of French stock, the total received was \$6,511.83. The first item that enters into and constitutes the sum above mentioned was \$2,900, received by Walker Bros. Bank on November 17, 1911; the next item is \$2,887.18, received March 27, 1912; the next item is July 15, \$724.65. That is all that the company has received from the Franco-American Bank. It received \$34.82 as the amount of money sent back by Mr. A. E. Raleigh. That was a refund. The \$7.18

(Testimony of John Janney.)

shown by the cash-book of the Utah National Bank, I presume was a deposit to cover an overdraft. On April 20, 1909, the company received \$1,425.00 from Mr. Locker; in May, 1911, \$662.50 from Mr. Locker. I see a deposit here in the bank account, November 20, of \$24,551.40. I presume that is the net amount of the \$25,000 received from New York from the sale of 165,000 shares of stock. The resolution shows what this is for. This is the McCornick Bros. transaction to which I testified. On March 16, \$1,000. That came from Mr. Locker and is the McCornick check sent in by Mr. Locker. It is entered here March 16, 1910. I feel safe in saying that this \$1,000 was for transfer of stock purchased by Mr. McCornick. On December 17, 1910, there was an amount deposited [94] of \$1,500. It represented a loan from Mr. Sherman—the Sherman mortgage, which I have heretofore mentioned. There is also an item of \$1.25. The bank charged a telegram to the company here, when it should have been charged to me, personally. I stated that the company owes Mr. Locker at present \$950, of which \$50 has been paid; I find there has been another payment of \$550 which further reduces it.

I cannot say how frequently informal meetings of the Board of Directors were held during the first year of the existence of the company, except that they were held frequently. I remember that several meetings, extending from 2 o'clock in the afternoon until 6 P. M., were held, and I have a recollection of several meetings that went up to 7 o'clock and there

(Testimony of John Janney.)

were a number of these meetings very frequently the first half of April. There was then a lull for a month or so. This was during the time I was an officer of the corporation.

The statement which has been introduced in evidence was a bill of Locker & Janney, which was the one in the resolution. I was in Twin Falls, Idaho, and it seemed that it was imminent that an engineer should come out from France and examine the mines, so I telegraphed to Mr. Raleigh to straighten up the mine and get it ready for the engineer's examination. That incurred some little expense. I do not remember just how much, and I submitted that to the Board of Directors as an item I thought they should pay, because it counted on the assessment work, and that was one of the items, I now remember, that entered into the account as specified in that resolution. There were a lot of other items that entered into it, at the time I thought were perfectly proper.

Mr. ASHTON.—Now, I desire to offer in evidence, if the Court please, all the minutes of the Board of Directors, including the loose sheets. They have not yet gone into the evidence.

Mr. SHANK.—No objection. (Received.)

(The minutes of the Board of Directors referred to in the last paragraph are contained in the minute-book, including pages 1-91, both inclusive, minutes of April 20, 1912, and the minutes of April 20, 1912, consisting of two pages, loose sheets, and the additional minutes which were not added in the regular manner to the book, dated August 30, 1912, consisting of one page.)

(Testimony of John Janney.)

WITNESS.—These that I have put in here are what has been signed by me [95] and they are minutes. The additional minutes which Mr. Ashton offers consist of seven sheets, bearing date of the 26th of June, 1912, November first, 1911, December 6th, 1911, and April 20th, 1912. There is nothing else that I know is a minute.

The company has kept, through its agent, the Trust Company, a record of the stock. That record shows the number of certificates and to whom it was issued. The only books that I have not mentioned are memoranda, showing the keeping of the business and the books that relate to the transactions in stock. The defendant corporation did not authorize the issuance of a prospectus, marked Exhibit No. 11, designated as the French prospectus. It has some correspondence to that effect. The cablegrams and telegrams and letters purporting to refer to that matter are the telegrams and copies of telegrams, letters and copies of letters, and a copy of the resolution sent and the letter received from the Franco-American Bank. (The papers last referred to were admitted in evidence and marked Defendant's Exhibit "L.")

Respecting the expenses which have been incurred with a view of financing the defendant company in France, we have in the files of the company a record which shows that there was deposited \$15,000.00 in the Franco-American Bank, by Mr. Locker, on his own account for the expenses of this UNDERWRITING SYNDICATE. I have a letter respecting this \$15,000. It is addressed to the Syndicate of the

(Testimony of John Janney.)

Tenabo Mining & Smelting Company, as follows: "We have the honor to inform you herewith of the current account with you to the 30th of September last at present to this date—francs 12,043—15 centimes, to your favor, which we report you this credit herewith." Signed by the Franco-American Bank, and on the other side, a statement of the expenses. Other expenses, Mr. Locker has made two trips to Paris, and he has sustained himself in Paris for two years, and the personal expenses incident to that he has made an outlay of. In getting the stock on the Paris market, there is a tax of \$10,000.00 required by the government. That \$15,000.00 paid that and \$5,000.00 more. That is what the report from the attorney shows—\$10,000.00 to the government. I know the Windsor Trust Company's bill for printing those certificates was approximately \$3,000 and those expenses add up very much in [96] excess of this \$15,000 and the contract states it to be \$30,000 namely, 150,000 francs. Now, they report that it vastly exceeds that amount when they pay all the expenses, because they paid all the expenses of this office. That Underwriting Syndicate has been sustaining this office, which this company has nothing to do with, and has not paid them. It has not paid for it and never will. The defendant company has no office in Paris.

I have examined the stock books of the corporation. As to whether or not the blank stubs disclose to whom, the date and amount of certificates, to whom issued, and the date thereof, and the dates issued, we have

(Testimony of John Janney.)

a complete report, but we do not keep it on the stubs. This record shows every certificate that has been issued and the name and the amount, and it is so accurate that in checking over this book, I was able to ascertain the particular certificate and the particular book from which it was taken, that Mr. Shank took in Salt Lake when they were taking the depositions. It is from Book "Q" (book marked Defendant's Exhibit "M," admitted in evidence). "Exhibit 'M' is an exhibit kept by the trust company and not by the defendant."

I have been in the Windsor Trust Company office especially to see them about that, and that is one reason I went to New York. I made four trips to New York, and I remember now that was the reason for one of them. It is the most approved method, stated to be the most scientific way, and I approve it.

Redirect Examination.

Exhibit "M" is an exhibit, is kept exclusively by the Trust Company in New York. It is a copy of the original. I have a record in our office. I got that for the purpose of this trial, and also for the purpose of continuing to keep it in my office from there on, and keep it posted up to date as near as can be. On April 20, 1909, Mr. Locker paid into our company \$1,425.00, and on April 21st, we paid him back \$1,140.00. On May 11th, 1909, he paid \$262.50, and we paid him back \$210.00. On March 16th, 1910, he paid in \$1,000.00, and on March 23d, we paid him back \$550.00. I do not know how much Mr. Locker received from the sale of these French contracts.

(Testimony of John Janney.)

[97] That money comes into the bank to the credit of the company. I have no way of knowing how much has been realized by Mr. Locker or by any of the agents of the Syndicate in France from the sale of these certificates. I have received nothing. I do not know what Mr. Locker has received. He has advanced me money that he says he borrowed from the bank. Mr. Locker took 25,000 shares of my personal stock and negotiated a loan. He sent me \$900.00 from Paris three or four months ago. "The last remittance from you before that was along about the 15th of January, \$1,000.00? The last money the company received from stock sales was July 15th, \$724.00, and the next payment prior to that was March 27th, \$2,887.00. These are two remittances received by us from the Franco-American Bank. "He sent me \$1,900.00 during January of this Year." At the time I left for the East—November or December—he sent me \$400.00.

When Mr. Locker sent me a remittance, he would tell me he had borrowed the last one. Mr. Coleman, of the Franco-American Bank, loaned him that \$900.00, because Mr. Coleman was interested in the Syndicate. I do not know whether Mr. Locker received any compensation or commissions on the sale of the French certificates of stock resulting in the two last remittances to the defendant company. He has never advised me of the source of any commissions which he has received, or if he has received any. I do not know by what means Mr. Locker has sustained himself in Paris these two years, except what he tells me.

(Testimony of John Janney.)

These letters I have submitted are letters that came from the letter "T" of the Tenabo file in the Locker file. I regard them as personal matters, and I thought they related to the Tenabo company and that I should keep them separate. I took most of them to the board. I did not take all of the letters that I put under the letter "T." I did not want to annoy the board to that extent, but I thought the board was entitled to see them if they should ask for them, and I thought I would keep those letters in that way.

I do not know at the present time how many shares of stock have been issued on these recent sales in France. The amount of stock we have put up to the company is 31,100 and some shares and the amount required we put up is 30,000 shares. [98]

Monday, September 9, 1912.

AFTERNOON SESSION.

Mr. JOHN JANNEY, redirect examination continued.

I have been at the mining property of the defendant a number of times. I have been going down to Tenabo since 1907, but I do not remember how many trips, but I have not been there since the incorporation of the company in 1908. I did not know there was a resolution passed by the board of directors on October 29th, 1910, authorizing Mr. Locker to retain 150,000 francs. I think it was to the UNDERWRITING SYNDICATE, and so far as I know no portion of it has been paid.

Mr. Locker was authorized by the defendant company to issue a prospectus. I am referring to the one

(Testimony of John Janney.)

attached to the deposition of Mr. Ferry. The letters signed by Mr. J. E. Frick and others added to the exhibit attached to Mr. Ferry's deposition make the complete record or prospectus that we have authorized. (Letters offered and received, marked Plaintiff's Exhibit No. 38.) Miss M. B. Robinson made up for filing with the attorney general the report, Plaintiff's Exhibit No. 8. She was the clerk in our office. She made it under my direction. Also the same with relation to the statement filed with the attorney general under date of May 31, 1911, being Plaintiff's Exhibit No. 9.

[Testimony of E. T. Patrick, for Plaintiff.]

Mr. E. T. PATRICK, called as a witness on behalf of plaintiff, testified as follows:

My name is Edward T. Patrick. Am deputy attorney of Nevada. I here produce all the records showing the filings with the Attorney General of reports of the Tenabo Milling & Smelting Company under the laws of the State of Nevada. The date of the last of those is July 1st, 1911. There is one dated June 30, 1910, and another November 30, 1910. (They are offered and received in evidence, subject to the objection that they are irrelevant and immaterial and not within the issues made by the pleadings.)

[Testimony of Andrew Maute, for Plaintiff.]

Mr. ANDREW MAUTE, on behalf of the plaintiff, testified as follows:

I live in Carson City, Nevada, and am familiar with the French language. I have made a transla-

(Testimony of Andrew Maute.)

tion of Plaintiff's Exhibit No. 11. The typewritten sheet handed to me by Mr. Shank is a translation of the first sheets referred to in said Exhibit No. [99] 11. The other sheet is a translation of the second of the sheets. I went over this translation yesterday and found it was correct as nearly as possible. The third sheet also. When it comes to an exact and literal translation, that is not a possibility. (It is admitted that the translation was substantially correct, and that the three sheets may be attached to Exhibit 11 as a translation of it, subject to the objection that they are not within the issues, incompetent, irrelevant and immaterial, and not in any way connected with the defendant company.)

[Testimony of Frank L. Sizer, for Plaintiff.]

Mr. FRANK L. SIZER, called on behalf of the plaintiff, testified as follows:

I live in Palo Alto, California; am a mining engineer. I have been a mining engineer for thirty years. After graduation at the University of Michigan I obtained my first practical experience at Leadville, Colorado, where I was employed as a mine surveyor, draughtsman, assayer, and later assistant superintendent. I have been engaged in mine examinations, direction and mining operations, as manager or consulting engineer, and have had experience in all of the mining States of the United States, also in British Columbia, Alaska and Mexico. At present, I am consulting engineer for the Mascot Copper Company in Arizona, and I am doing examination work as it is offered to me. I have made an exam-

(Testimony of Frank L. Sizer.)

ination of the geological condition of the mines of the defendant company. I have examined and sampled all of the accessible openings of the Tenabo Milling & Smelting Company, and have examined adjoining properties.

The country in which these mines are located is a quartzite and quartz porphyry, with porphyry dykes and veins cutting through the formation in some places. "These veins bearing gold and silver and copper ore." The Tenabo property is located about 23 miles from the Southern Pacific Railroad. The means of access is by wagon road. From the Tenabo Company properties, I took five samples. I delivered them to an assayer. I should say that the development of the mining district of the Tenabo is not sufficient to justify the establishment of a smelter or stamp-mill.

Cross-examination.

I have been a witness many times with reference to geology or mining [100] properties, and in reference to the practical ends of mining. Mr. George S. Kimball first approached me on becoming a witness in this case, and I afterwards saw him and discussed the matter with him. He told me to examine the mines, to ascertain their value, and that I would be required as a witness. He said it was a suit for a receivership based upon the question, I think, of the management of the property. On the evening of the second day that I was in the Tenabo district, he submitted to me the report of Mr. Duncan McVichie. I was five days making the examination and confin-

(Testimony of Frank L. Sizer.)

ing my surface examination to about 300 acres. I thought I could get a substantial understanding of that 300 acres so far as the openings went. I recollect discovering five beddings. The veins were bedded in quartzite and quartz prophyry. From the surface it does not seem to be a fissure.

“I saw ore on the surface of the Gem claim lying between strata of the same kind of rock, which indicated to me that the vein there was not a fissure. It is possible for a fissure to exist with both walls existing in the same kind of rock. The peculiarity about this that indicated that it was not a fissure, was that it was in the strata. By strata, I mean the parting in the beddings. My examination of this property was very thorough with regard to everything except the Gem. The determination that where a fissure vein with mineral in it will develop into a mine, depends to a great extent upon the conditions disclosed by developments in the depths. I saw the evidence of mineral on the surface of the Gem. I did not see anything further that I thought worth while to sample.”

Redirect Examination.

I did not examine the Gem, because the carbonic acid gas fills the workings and it is impossible to get in them. “And Mr. Raleigh, who was in charge of the property, refused me the use of the machinery on the property to blow fresh air into the mine. He gave no reason for his refusal, simply said he would not give permission until he was directed by someone in Salt Lake to do so. We then tried to get permis-

(Testimony of Frank L. Sizer.)

sion from Salt Lake, but failed." I examined the Gold Quartz property. It is in the same district. This examination increased my knowledge very much. I examined three different [101] properties in the Gold Quartz and took in my examination 41 samples.

Recross-examination.

In my examination, I found six veins on three different properties. I am not ready to say that I found what I believe to be Gem vein in the Gold Quartz property. It might be, but I am not sure. In order to become familiar with the geology of the mining camp, one is required to expend considerable time, investigating surface conditions as well as underground conditions, but I think that that geology was very easily read. I examined the vein only to a depth of forty feet and only in some shallow surface openings. I could not be sure whether it was a bedded vein from that examination, and that was the only examination I made that had reference to it.

[Testimony of Max R. McColloms, for Plaintiff.]

Mr. MAX R. MCCOLLOMS, on behalf of plaintiff, testified as follows:

I reside at Reno, and am an assayer. Mr. Frank L. Sizer delivered to me certain bags of ore, numbered 3629 to 3624. I assayed those samples separately and as independent assays of the various samples that he delivered to me, for gold, silver and copper. I found the assay No. 3629 to be, in total values, \$29.70; No. 3630, \$25.20; No. 3631, \$27.60;

No. 3632, \$12.70; No. 3633, \$16.60; and No. 3634, \$16.95.

**[Testimony of Frank L. Sizer, for Plaintiff
(Recalled).]**

Mr. FRANK L. SIZER, recalled by the plaintiff.

I have compared the valuations which I got with the valuations reported by Mr. McVichie and Mr. Brown. My assays and Mr. Brown's are almost identical, and Mr. McVichie's are about 30% higher.

The following testimony, to wit, that of Edward O. Howard, W. Mont Ferry, John Pingree, Benner X. Smith, C. S. Varian, Lester D. Freed, H. P. Clark, R. T. Badger and Duncan MacVichie, witnesses for the complainant, and Charles D. Bates, who was called as a witness for the defendant, was all taken before J. W. Christy, Standing Examiner of the United States District Court for the District of Utah, and Special Examiner for this court, and was, at the trial, by stipulation duly admitted:

**Report of Testimony, Evidence and Proofs of John
W. Christy. [102]**

I, John W. Christy, Standing Examiner of U. S. District Court for Utah, report that, by reason of my commission to take testimony and proofs of both parties, by order of Jan. 20th, 1912, J. D. Skeen, and complainant, appeared in my office on the 6th day of February, 1912, and presented to me the annexed stipulation to adjourn taking of testimony at 10 o'clock A. M. of the 12th day of February, 1912, to which I assented.

On February 12, 1912, 10 A. M., complainant and

(Testimony of John W. Christy.)

J. D. Skeen, attorney, ask for second adjournment of the hearing of testimony until 19th day of February, 1912, to which I assented.

On February 19th, 1912, at 2 o'clock P. M., said complainant again appeared with his attorney, and on account of the absence of H. C. Edwards from the city, meeting adjourned until the 20th day of February, 1912, at 11 o'clock A. M.

On February 20th, 1912, at 11 A. M., said complainant, by counsel, and said defendant, by counsel, comes, and having announced readiness, I personally took testimony following:

[Testimony of Edward O. Howard, for Plaintiff.]

EDWARD O. HOWARD.

My name is Edward O. Howard. I am cashier of Walker Brothers Bank, and have been such for two years. I have resided in Salt Lake City twenty-two years. I am treasurer of the Tenabo Mining & Smelting Company, and have been for two years.

The other officers of the company are W. Mont Ferry, President; John Pingree, Vice-President; John Janney, Secretary, I believe, and I am Treasurer. The active officers just named, together with Benner X. Smith, constitute the board of directors. I do not think there is an officer that we consider a managing officer, unless it is Mr. Janney, who has been more active than any other person. The company maintains offices at the Mercantile Building in this city. Mr. Janney is in charge of same. At the present time, Mr. Janney is in New York, I believe. He went about the first or middle of January. I

(Testimony of Edward O. Howard.)

have not been in the offices since Mr. Janney left. He keeps the books, assisted by his clerk. The clerk, or stenographer, is not there now. The books consisted of the minute-book and other books of record which are kept by all companies, I suppose. I never see them. [103] Well, I have seen the minute-book, book of record, and the stock books.

The board of directors meets at irregular intervals, or when occasion offers or business demands. (Defendant objects to evidence as not best.) The secretary or president called the meetings. (Objection to same.) We had no regular meetings of the board, although we met frequently. (Objection by defendant, as irrelevant.) We have had, I should say, fifteen or twenty meetings. I kept no particular track of them. When a meeting was desired, the president or secretary would call up the members of the board and give notice thereof. The secretary keeps the minutes of the meetings. The minutes were always read at the subsequent meeting and approved in ordinary method. The minute-book is in the hands of the secretary, I suppose. I suppose when he left for New York he left them in his office here.

Mr. Janney told me he was going east. I did not know he was going to New York. He told me definitely only a day or so before he left. I do not know what business he went upon. The board of directors did not discuss what he was to do in New York. I do not remember whether I asked him how long he would be gone. (The evidence objected to as irrelevant.)

(Testimony of Edward O. Howard.)

He did not tell me what he was going to do about the office while gone. (Objection made, evidence being irrelevant.) I do not know where any of the books are except the check-book, which he gave me. I got that about the 17th of November and I drew the next check. That was about 1911, I think. Mr. Janney was here at that time. I did not draw checks prior to that day but signed them all—well, not all. The stub was filled out by me on that day, and that is why I remember the date. (Witness produces book on request.) The company had another check-book opened on November 17th, 1911. The account prior to that was kept with the Utah National Bank, and when the account was transferred to Walker Brothers Bank, that check-book was prepared. I have, I think, drawn up or signed all checks drawn upon the company's funds since my election as treasurer in February, 1910. We transferred the account to our bank simply out of courtesy to the treasurer, I guess, I did not request it. If there was any other reason, I do not know [104] it. As a matter of fact, the account was not really transferred. There was some money coming into the company's funds, and that was deposited with the Walker Bank and the account with the Utah National was closed about that time.

The cancelled checks evidenced by the stubs shown here are at the Walker Brothers Bank. I did not bring them with me. I thought you wanted only the records of the company. However, I can get same. The system used by our company is this—the secretary fills out checks and presents them to the treas-

(Testimony of Edward O. Howard.)

urer for signature, together with a voucher for receipting on payment of check, showing nature of the disbursement, the treasurer then signs the check. The one receiving the money signs vouchers. It is not formally approved. The treasurer pays whomsoever the secretary tells him to pay. The signature of the president is not required. The board of directors does not audit same either.

As a general thing, the treasurer does not get those vouchers. On or about November 17th, the company received a sum of money and deposited it in the Walker Brothers Bank. It was between \$2,900.00 and \$3,000.00. It was a telegraphic transfer paid to the company through the Utah National Bank, under instructions from their New York correspondent, and was received, I think, from Mr. Locker. It was for the use of the company—disbursements. I do not know anything else about it. The other officers might know. We have not had any board meetings since that time. I think I asked Mr. Janney at the time where it came from, whether it was a loan, etc. I don't know that I was surprised at receiving it. (Objection to this, as being immaterial.) There was no entry made of it upon my book. I did not keep any treasurer's books. It was put to the credit of the Tenabo Mining & Smelting Company. Received the same as cash deposit in the bank. The secretary kept all the books, and I did not make any entry upon the company's books myself. I assumed it was proceeds from the sale of stock. The company entered into a contract with Mr. Locker to sell some of its

(Testimony of Edward O. Howard.)

treasury stock, and I presume this is the proceeds of the sale of some of that stock. That contract was made nearly two years ago. I have not been informed as to the same only that it was from sale of stock. They told me that was what it was. [105] Mr. Janney did, I think. He did not say how much stock. I do not recall the exact details of the transaction.

I think Mr. Janney must have wired him for the money. I think he told me he did. There was no note executed for it. We do not keep a cash account showing receipts and disbursements of the company. The bank books would show the exact amount of money received. (Check shown, drawn November 17th, 1911, made payable to order of W. H. Shearman.) What was this for—I notice on the stub it says “\$500.00 account principal; \$187.50 interest to May 16, 1912, and \$25.00 attorney’s fees.” There is still five hundred dollars owing on that loan. There must be still \$1,000.00 unpaid. The mortgage was not released. It was placed in the hands of attorneys for collection and that was the fee. It was Mr. Shearman’s attorney and the check made payable to Mr. Shearman. He is the city auditor.

The check drawn to the Windsor Trust Company for \$406.90 was in settlement of their bill as transfer agents of the company. It had been running for some time. The checks in favor of the Western Union and Postal Telegraph companies are correct. The check drawn on Dec. 6th was to N. B. Robertson, alady stenographer employed in Mr. Janney’s

(Testimony of Edward O. Howard.)

office. The check drawn to the Union Trust Co. for \$250.00 was for services as Registrar of the company. It had been running some time. The only source of income the company has is the sale of treasury stock. I do not think any has been sold since I have been treasurer.

I have one hundred shares in the company. I acquired that two years ago, when I was elected upon the board. I got it from Mr. Janney, for \$1.00, I believe. The only indebtedness I know of that the company has is the balance due W. H. Shearman. It may have had current bills owing, such as attorneys' fees, directors' fees, but no pressing obligations I know of. It is true that the company has liabilities amounting to \$8,297.75. The directors voted a sum of money for their services amounting to \$50.00 per month. (On asking if the board prior to the present one had a similar resolution, defendant objected on the ground that it was not in issue.) I think each of the officers received pay on the other board. (Objection, as it is mere assumption.) On the other board were R. T. Badger, C. S. [106] Varian, Mr. Clark, Mr. Edwards—I think—Mr. Freed. I do not know how long they served on the board.

I remember that there was a contract discussed, with Mr. P. D. Locker. That was before I was elected to the board. There were two contracts, but the one made on the French trip was made after the present board was elected. It was made in March, following the election in February—yes, that is cor-

(Testimony of Edward O. Howard.)

rect, I guess. (Letter dated Aug. 14, 1911, written to J. D. Skeen and signed by John Janney.) Yes, that is his signature. (Letter offered in evidence.) (Objection, as immaterial.) (Letter marked "Exhibit 1, J. W. C., Examiner," and copied now:)

Exhibit 1 [Letter, Dated August 14, 1911, Tenabo M. & S. Co. to J. D. Skeen].

Exhibit 1, J. W. C., Examiner.

Directors:

Benner X. Smith.
W. Mont. Ferry.
John Pingree.
E. O. Howard.
John Janney.

Officers:

W. Mont. Ferry, President.
John Pingree, Vice-Pres.
John Janney, Secretary.
E. O. Howard, Treasurer.
Cable Address:

Tenaboms.

TENABO MINING & SMELTING CO.

105-106 Mercantile Block.

Salt Lake City, Utah, Aug. 14, 1911.

Mr. J. D. Skeen,
Kearns Bldg., City.

Dear Sir:—Please take notice that the meeting of stockholders of the Tenabo Mining & Smelting Company adjourned from July 15th to August 15th, 1911, will be held at 2 o'clock P. M. on that date at 105 Mercantile Block, for the purpose of passing upon the minutes of previous meetings and for the further purpose of considering a proposal contained in a letter from Mr. P. B. Locker of which the following is a copy:

“Tenabo Mining & Smelting Company,
105 Mercantile Block,
Salt Lake City, Utah.

Gentlemen: In view of the approaching meeting

of stockholders I would like for you to consider and if possible relieve me of my contract relative to the financing of your company. By this do not understand that I am abandoning the work, nor do I wish to do so. I would like at this time, however, to make another effort to have the company carry the expenses incident to its financing with the understanding that I continue the work in your behalf, that you pay the expenses of these negotiations and that I receive no commission.

I will willingly bear the burden of the work here, though I have already given two of the best years of my life to this corporation and its affairs, but as I have never accepted commission from other companies in which I am interested, I prefer this policy of work and if you will return to me the advances I have made up to this time in this matter, assuming such obligations as I have incurred in securing money which has been expended in getting to the point we have now attained, it will be a very easy matter to place the business on the same basis as the work I have done for other companies in which I am interested and which personally I very much prefer to the present plan.

In conclusion I would call to your attention that there are in the treasury something like 100,000 shares of stock which you are free to use and which, at the price provided in my contract—50 cents a share—could easily afford you adequate funds for such expenditures of money as have [107] been made to date and thus enable you to receive the entire proceeds from the sale of stock effected by me

(Testimony of Edward O. Howard.)

here, subject to my contracts with bankers and their agents here.

Trusting that stockholders will give this matter careful consideration, and with the hope that they will accept my suggestion, I am,

Very truly yours,
(Signed) P. B. LOCKER."

Yours very truly,
TENABO MINING & SMELTING CO.,
JOHN JANNEY, Secretary.

I have read that letter. I do not know whether a meeting was held subsequent to the date of that letter to act upon the request of Mr. Locker. I do not know whether the officers ever took any action in the premises at all. I do not know where Mr. Locker is now. Neither do I know when the company received any communications from Mr. Locker. I think he is trying to do something with reference to his contract with the company. Mr. Janney told me when he was in New York. (He produces letter.) (Other letters asked for, objected to by Mr. Edwards, but handed to counsel for complainant by witness.)

In order to get the minute-book or books of account of the company, it is necessary to get into communication with the secretary. The company's office is in Mr. Janney's office. We have not paid office rent at all. They paid the stenographer \$100.00.

This is the original ledger sheet of Walker Brothers Bank. Shows a complete account with the Te-

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(Testimony of Edward O. Howard.)

nabo Mining & Smelting Co., with the exception of one check, which will make a balance of one hundred and fifty dollars less than is shown here. The balance will then be \$16.52.

(Following is complete copy of ledger sheet:)

Sheet No. 1.	Walker Brothers, Bankers. Acc't. No. 30.		
	Name—Tenabo Mining & Smelting Co.		
	Address—E. O. Howard, Treas. 30.		
Date.	Checks in Detail.	Total Checks.	Deposits. Memo. Bal.
1911.			
Nov. 17.			2900 2900
18.	712.50		2187.50
24.	26.32		2161.18
[108]			
28.	1.50 Ck. Book		2159.68
29.	25.83		2133.85
Dec. 1.	406.90		1726.95
6.	250.		1476.95
7.	25.		1451.95
11.	100.		1351.95
18.	100.		1251.95
20.	500.		751.95
21.	3.25		748.70
22.	7.18		741.52
Jan. 2-1912.	375.		366.52
15.	200.		166.52

As to this \$2,900.00 from Locker, I do not think I could give you any other information as regards it. The company regards it as the proceeds of the sale of stock or an advance under this contract entered into with Mr. Locker. (Contract shown, dated March 5, 1910, with P. B. Locker.) (Copied here.) "It is expressly understood and agreed that the company shall in no way be liable for any fees or expenses for the listing of said stock, or trustee's fees and expenses or any other expenses whatsoever, and that

(Testimony of Edward O. Howard.)

each and every share of stock so sold shall net the company 50 cents per share.”

I do not understand that the fees paid these two trust companies since receipt of this last money from Locker were accounts for bills that were contracted under that contract. (Mr. Edwards objects, not within the issues of pleadings.) They were bills contracted before that contract. They no doubt have stood for some time. I know of no other explanation for them. (Resolution of defendant company presented, dated the 8th day of February, 1911, and copied here:)

“Resolved that this company authorize the payment of \$25,000 to the order of P. B. Locker from the money deposited in the Franco-Americane Banque to the credit of this company from the sale of the first allotment of one hundred and fifty thousand shares of stock, but not, however, until the entire allotment of one hundred and fifty thousand shares aforesaid has been paid for in full, and upon the condition that the said P. B. Locker deposit with the said Franco-Americane Banque fifty thousand shares of the stock of this company as represented by five thousand French bearer certificates of the denomination of ten shares each, heretofore loaned to the said P. B. Locker by the Tenabo Mining & Smelting Company for the purpose of providing funds for expenses,” etc.

I do not know whether Mr. Locker received for himself any sum from the sale of any certificate at the time he sent this \$2,900.00. I assume that [109]

(Testimony of Edward O. Howard.)

money is from the sale of treasury stock. There was a Syndicate formed over there, as I understand it, and it may have been advanced by this Syndicate that undertook to underwrite this stock.

Cross-examination by Mr. EDWARDS.

This corporation had no regular meetings, that is regular times for their meetings. The by-laws did not fix any time. These meetings were held in response to telephone messages. I will not say there were never written notices, but I do not recall any written notices. I do not recollect ever having signed a waiver. I have not attended all the meetings. Yes, before the meeting, claims have been considered and also their correctness. Yes, I remember instances in which vouchers and receipts have been presented after the payment of claims against the company for consideration of the board, for the purpose of ratification. I have not read the minutes lately. I do not know what they contain at present. The minutes were always read and approved at the next meeting. I did not hear the name of the Franco-Americane Banque mentioned in connection with that money and receipt of same. I do not know positively where it came from. My answer was merely hearsay. I was not present at any meeting of the board when arrangements were made as to this money. Neither have I read the minutes of said meeting.

The amount of money owing to Mr. Shearman is not due until May 1st, I think. I do not know what the money paid to the Windsor Trust Co. was for. I

(Testimony of Edward O. Howard.)

do not know that Mr. Benner X. Smith is retained as the attorney for this company in this suit. I was not present at the meeting when same was taken up. The fact that the directors received \$50 per month prior to my election was gotten from the books of record. All I know is in the books of record for the Tenabo Mining & Smelting Co. I have not seen the entry in the book of where any director received \$50 per month. I do not remember of any payments of rent. It might be possible that some were made. (Witness being asked if he had been present at meeting of the board when resolutions had been adopted, answered No.) [110]

Redirect Examination by Mr. SHANK.

Those resolutions may have been adopted at a meeting at which I was present, but I do not think so.

Cross-examination by Mr. EDWARDS.

(Checks issued since Nov. 17, 1911, produced in evidence and copied here in full:)

Salt Lake City, Utah, Nov. 21, 1911.

No. 2.

WALKER BROTHERS, Bankers. 31-5

Established 1859. Incorporated 1903.

Pay to the order of Windsor Trust Co.

Tenabo Mining & Smelting Co. \$406.90—Four hundred six and 90/100 dollars.

E. O. HOWARD, Treasurer.

(Perforated:) Paid.

(Stamped on face:)

Walker Brothers Bankers, Salt Lake City. Dec. 1, 1911. Paid through Clearing House.

(Stamped on back:) Pay to any Bank or Banker or order. Windsor Trust Company. 65 Cedar St., New York City. M. Tilden, Treasurer.

Pay to the order of any bank or trust Co. Prior endorsements guaranteed. Nov. 27, 1911. Franklin National Bank, Philadelphia. E. P. Passmore, Cashier. Paid through Clearing House National Bank of the Republic. Dec. 1, 1911. Salt Lake City, Utah.

Salt Lake City, Utah, Nov. 21, 1911.

No. 5.

WALKER BROTHERS Bankers. 31-5.

Established 1859. Incorporated 1903.

Tenabo Mining & Smelting Co. Pay to the order of A. E. Raleigh
\$100.00—One hundred dollars.

E. O. HOWARD, Treasurer.

(Perforated:) Paid.

(Stamped on face:) Walker Bros. Bankers. Salt Lake City. Dec. 11, 1911, paid through clearing house.

(Endorsed on back:) A. E. Raleigh.

(Stamped on back:) Pay First National Bank, Elko, Nevada, or order. The Beowawa Mercantile Co., Beowawa, Nevada. Pay Continental National Bank, Salt Lake City, Utah. (All prior restrictive endorsements guaranteed.) The First National Bank, Elko, Nevada. C. F. Williams, Cashier, Continental National Bank, Dec. 11, 1911. Paid through Clearing House, Salt Lake City, Utah.

Salt Lake City, Utah, Dec. 6, 1911.

No. 6.

WALKER BROTHERS, Bankers. 31-5.

Established 1859. Incorporated 1903.

Pay to the order of A. E. Raleigh

Tenabo Mining & Smelting Co. \$500.00—Five hundred and no/100 dollars.

E. O. HOWARD, Treasurer.

(Perforated:) Paid.

(Stamped on face:) Walker Bros. Bankers, Salt Lake City. Dec. 20, 1911. Paid through Clearing House.

(Stamped on back:) Pay First National Bank, Elko, Nevada, or order. The Beowawa Mercantile Co., Boewawa, Nevada. Continental National Bank Dec. 20, 1911. Paid through Clearing House, Salt Lake City, Utah. [111] Pay Continental National Bank, Salt Lake City, Utah. (All prior Restrictive Endorsements Guaranteed.) The First National Bank, Elko, Nevada, C. F. Williams, Cashier.

(Endorsed on back:) Pay to the order of Beowawa Mercantile Company. A. E. Raleigh.

Salt Lake City, Utah, Dec. 6, 1911.

No. 7.

WALKER BROTHERS, Bankers. 31-5.

Established 1859. Incorporated 1903.

Tenabo Mining & Smelting Co. Pay to the order of N. B. Robertson \$100.00—One hundred and no/100 dollars.

E. O. HOWARD,
Treasurer.

(Perforated:) Paid.

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(Stamped on face:) P. Walker Bros., Bankers, Salt Lake City. Dec. 18, 1911. Paid through Clearing House.

(Endorsed on back:) N. B. Robertson.

(Stamped on back:) Pay to the order of any bank, Banker or Trust Co. All prior endorsements guaranteed. Dec. 15, 1911. International Banking Corporation. 11-30. San Francisco, Cal., 11-30. E. W. Wilson, Mgr. Continental National Bank. Dec. 18, 1911. Paid through Clearing House, Salt Lake City, Utah.

Salt Lake City, Utah, Dec. 6, 1911.

No. 8.

WALKER BROTHERS, Bankers. 31-5.

Established 1859. Incorporated 1903.

Pay to the order of Skeen and Skeen or

Tenabo
Mining &
Smelting Co.

John Janney \$250.00—Two hundred fifty
and no/100 dollars for a/c John Tyree vs.
Tenabo M. S.

E. O. HOWARD,
Treasurer.

(Perforated:) Paid.

(Stamped on face:) Walker Brothers, Bankers. Paid Dec. 6, 1911. Paying teller, Salt Lake City, Utah.

(Endorsed on back:) To pay't of Currency to Skeen & Skeen. John Janney.

vs. Charles D. Bates.

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Salt Lake City, Utah, Dec. 6, 1911.

No. 9.

WALKER BROTHERS, Bankers. 31-5.

Established 1859. Incorporated 1903.

Pay to the order of Skeen & Skeen or

Tenabo Mining & Smelting Co. John Janney \$25.00—Twenty-five and no/100 dollars.

E. O. HOWARD,
Treasurer.

John Janney.

(Perforated:) Paid.

(Stamped on face:) Walker Brothers, Bankers.

Paid Dec. 7, 1911. Paying Teller, Salt Lake City, Utah.

(Endorsed on back:) John Janney.

Salt Lake City, Utah, Dec. 9, 1911.

No. 12.

WALKER BROTHERS, Bankers. 31-5.

Established 1859. Incorporated 1903.

Pay to the order of Union Trust Co.,

Tenabo Mining & Smelting Co. N. Y., \$375.00—Three hundred seventy-five dollars.

E. O. HOWARD,
Treasurer.

(Stamped on face:) Walker Brothers, Bankers, Salt Lake City. Jan. 2, 1912. Paid through Clearing House.

(Stamped on back:) Pay to the order of The Philadelphia Nat'l Bank. Dec. 26, 1911. Union Trust Company of New York. Pay to the order of

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any bank or trust Co. 3-1. Dec. 27, 1911, 3-1. Prior endorsements guaranteed. The Philadelphia Nat'l Bank. H. J. Keser, Cashier. Pay to the order of National Bank of Republic. Salt Lake City, Utah. Continental and Commercial Nat'l Bank, 28, of Chicago. 2-3. Nathaniel R. Losch, Cashier. Pay to the order of Continental and Commercial Nat'l Bank, 3, Chicago, Ill. 0. All prior endorsements guaranteed. Dec. 27, 1911. Philadelphia National Bank, Philadelphia, Pa. H. J. Keser, Cashier. Paid through Clearing House Nat'l Bank of the Republic. Jan. 2, 1912. Salt Lake City, Utah.

Salt Lake City, Utah., Dec. 19th, 1911.

No. 13.

WALKER BROTHERS, Bankers. 31-5.

Established 1859. Incorporated 1903.

Tenabo Mining & Smelting Co. Pay to the order of Century Printing Co. \$3.25—Three and 25/100 dollars.

E. O. HOWARD,

Treasurer.

(Stamped on face:) Walker Bros., Bankers, Salt Lake City. Dec. 21, 1911. Paid through clearing house.

(Perforated:) Paid.

(Stamped on back:) Pay to the order of [112] The Utah National Bank of Salt Lake City, Utah. Century Printing Co. Paid through Clearing House. Dec. 21, 1911. The Utah National Bank.

Salt Lake City, Utah., Dec. 21, 1911.

No. 14.

WALKER BROTHERS, Bankers. 31-5.

Established 1856. Incorporated 1903.

Tenabo Mining & Smelting Co. Pay to the order of Utah National Bank
\$7.18—Seven and 18/100 dollars.

E. O. HOWARD,
Treasurer.

(Perforated:) Paid.

(Stamped on face:) Walker Bros., Bankers, Salt Lake City. Dec. 22, 1911. Paid through Clearing House.

(Stamped on back:) Paid through Clearing House. Dec. 22, 1911. The Utah National Bank.

Salt Lake City, Utah, Jany. 8th, 1912.

No. 15.

WALKER BROTHERS, Bankers. 31-5.

Established 1859. Incorporated 1903.

Tenabo Mining & Smelting Co. Pay to the order of A. E. Raleigh
\$200.00—Two hundred dollars.

E. O. HOWARD,
Treasurer.

(Perforated:) Paid.

(Stamped on face:) Walker Bros., Bankers, Salt Lake City. Jan. 15, 1912. Paid through Clearing House.

(Endorsed on back:) Pay to the order of Beowawe, Mercantile Co. A. E. Raleigh.

(Stamped on back:) Pay First National Bank, Elko, Nevada, or order. The Beowawe Mercantile Co., Beowawa, Nevada. Continental National Bank Jan. 15, 1912. Paid through Clearing House. Salt

(Testimony of Edward O. Howard.)

Lake City, Utah. Pay to Continental National Bank, Salt Lake City, Utah. All prior restrictive endorsements guaranteed. The First National Bank, Elko, Nevada. C. F. Williams, Cashier.

I have not all the vouchers that went with the checks, but the package which I have handed you contains all I have in my possession. Said vouchers are as follows:

Nov. 17, 1911, W. H. Shearman, \$500 on principal of note and \$187.50 int. to May 16, 1912. \$25.00 attorney's fees.

Dec. 8, 1911. Windsor Trust Co., transfer agent for certificates Nos. 1-250, 1001-2500, 2501-2594, 3001-3500, 4001-4225, 2569, and services, \$406.90.

Dec. 11, 1911. A. E. Raleigh, assessment work done, \$100.

Dec. 11, 1911. A. E. Raleigh, driving 50 feet tunnel, @ \$8.00, \$400. Sinking 13 ft. shaft, @ \$8.00, \$104, total \$504.

Dec. 6, 1911. John Tyree, balance due for assessment work, \$250. Interest and costs, \$25. Total, \$275. Notification under date of December 12, 1911, from the Union Trust Company that if bill is not paid, no more stock will be registered. Bill of Western Union Telg. Company for \$25.83 for statements of June, Sept. and Oct., 1911. Paid Nov. 22, 1911.

Bill of Postal Telegraph & Cable Company, statements of July, August and September, \$26.32, paid, Nov. 22, 1911. Check No. 5, under date of Nov. 21, 1911, was to A. E. Raleigh and was for assessment work done, he being an employee of the company and

(Testimony of Edward O. Howard.)

employed to do assessment work. Check [113] No. 6 is to the same person for the same purpose. Check No. 8, I think, is for the settlement of a claim of John Tyree's against the company, same being for assessment work, and a suit having been brought. Check No. 9 is for the costs of this suit.

Checks Nos. 10 and 11, to A. E. Raleigh, were for assessment work, but were never issued. Check No. 12 was for the services of the Union Trust Company as Registrar for stock one year and six months, \$250 per annum, \$375. Paid by me and issued by Mr. Janney. Check No. 13 to Century Printing Co. for \$3.25 for 175 reports, to be sent to the stockholders. Check No. 14 to Utah National Bank, in settlement of overdraft, \$7.18. That was to close the account with them which had been overdrawn. Gave check on Walker Brothers Bank. Check No. 15 to A. E. Raleigh, \$200, assessment work. Check No. 16 to A. E. Raleigh for assessment work, \$150. Check No. 7 to N. B. Robertson for stenographic work, \$100. Services rendered by her as clerk and stenographer. Check No. 1, to W. H. Shearman, \$500 principal, and \$187.50 int. to May 16, 1912, \$25.00 attorneys' fees; total, \$712.50. The interest was paid up to 16th day of May, 1912. Check No. 2, to Windsor Trust Co., for services to the company as transfer agent to April 1, 1911, \$250 and extra services, \$156.90; total, \$406.90. The item covered by this check was not to be paid by Mr. Locker under his contract. Check No. 3, to Western Union Telg. Co., June, Sept. and Oct. accounts, \$25.83, for messages sent or received

(Testimony of Edward O. Howard.)

by the company. Check No. 4, to Postal Telg.-Cable Co., for July, Aug. and Sept. acc'ts, \$26.32, is for messages sent or received by the company.

There is about \$150 yet due on the assessment labor for 1911 upon all mining claims of the company, to Mr. Raleigh. I think all the assessment labor for the year 1911 was done and performed upon the claims of the company.

Redirect examination by Mr. SHANK.

All the indebtednesses of the company are subject to demand for payment, but there is no definite time for payment to be made. Except the one thousand to Mr. Shearman, I know of no other that is not at the present due, I suppose. (Mr. Edwards objects—conclusion of witness.) No, everything [114] is not due. The attorneys' fees are not, neither are the directors' fees. These fees are due, but not at any special time. As to the \$2,900, I have stated I do not know about it. I cannot tell how much is due the directors or what items make up the \$8,200 the company owes. The company owes attorneys' fees, directors' fees—in the neighborhood of twelve hundred dollars. I do not positively know the indebtedness of the company at all. The payments I made to those two trust companies was discussed by the board at their meeting and frequently mentioned that they should be paid.

I never discussed with anyone the relation which these payments bore to the Locker contract. I do not know how much the company is indebted to Mr. P. B. Locker for.

(Testimony of Edward O. Howard.)

Cross-examination by Mr. EDWARDS.

Yes, I believe all the payments for which I signed checks or drew checks were honest obligations of the company. (Objection made, as irrelevant and not within the issues.)

Redirect Examination by Mr. SHANK.

I received \$50.00 for one month's payment for directors' fees. The first month, in March, 1910. (Request made for books or accounts of company in witness' possession, but none were had.)

(Witness excused.)

(Taking of testimony adjourned until Wednesday, 21st day of Feb., 1912, 10 o'clock A. M.)

February 21, 1912, 10 A. M.

Complainant and counsel and defendant by counsel appear. Testimony continued.

[Testimony of William M. Ferry, for Plaintiff.]

WILLIAM M. FERRY, witness produced by complainant, testified as follows:

Direct Examination by Mr. SHANK.

My name is William M. Ferry. I reside in Salt Lake City. I conduct my father's estate, which consists in mining property, banking interest, etc. I have lived there since 1898. I am director in Walker Brothers, Bankers, also in the Utah Savings & Trust Co. Also a stockholder of the Tenabo Mining [115] & Smelting Co., holding 100 shares. I acquired same in early part of 1910, from Mr. John Janney, for about a dollar or thereabouts. I am president and director of the defendant company,

(Testimony of William M. Ferry.)

having been such since about the time I acquired my stock, practically two years. There is no regularly appointed general manager, the affairs of the company being conducted by the board of directors. I suppose I am really the executive officer. Mr. Janney is the one who carries out the directions of the board of directors. He is a director and the secretary of the company. I have held many meetings, formal and informal. I should say there have been held fifteen or eighteen meetings at least. Many informal meetings. I have never personally called a meeting. Mr. Janney had charge of that part. The details were left to Mr. Janney under the supervision of the board generally. (Objection, not best evidence.) All the minutes of the board have been approved with the exception of the last meeting. That was in November, 1911. The other members of the board were elected when I was. Yes, I received fifty dollars the first month. I have never seen this mining property. I think Mr. Janney has seen it. The secretary has kept the books of the company. Some of them were kept in New York by reason of the fact that we had a Registrar in New York. I mean the records of the transfers and the registration of the stock certificates. The secretary kept the minute-book, also the files and records. His office is 103 Mercantile Block, in Salt Lake City. Mr. Locker's name is on the door.

I have nothing belonging to the company except these two packages, which came from New York, and were in the Co.'s office until Mr. Janney went away.

(Testimony of William M. Ferry.)

He brought them to my office and left them there. They contain stock certificate books. There are 15 of these books: These embrace certificates that have been canceled as well as those that are unissued. Do not know who asked for them to be delivered to me. I think it was within a week or ten days before he left the city that he brought them over, about the 20th of December, perhaps. He was going to Virginia over the holidays. No discussion was had by the board as to his going. I do not remember what it was about. I think he intended doing some business for the company while there. He gave me his key. I tried to find the minute-book, but could [116] not. The desk was locked. The annual meeting of the stockholders was held on February 12th at two P. M. There was no business transacted. Mr. Benner X. Smith and I were present, and adjourned the meeting to March 11, and posted a notice to that effect on the door. I last saw Mr. Locker about two years ago. He went to France and has been there ever since. Mr. Janney has carried all communications with him. He would present same to the board. Frequently he addressed cables to the company. Mr. Janney accepted them. By virtue of an arrangement between the Tenabo Company and the Telegraph Company these cables were paid for by the company, and the company paid for the replies. We had confidence in him to do the right thing. We did not have so much confidence in Mr. Locker. So far as I know, there has been no question of his reliability. The company has been

(Testimony of William M. Ferry.)

strict but that is all. It was never known that Mr. Janney was interested in the Locker contract. Mr. Skeen told me of it, in our interviews. That was about May 11th. I do not know whether or not Mr. Locker is operating under his contract with the company. I have never seen contracts with relation to the acquirement of the properties of the Tenabo Consolidated Mining Co. by this defendant company, formerly owned by Locker and Janney. I knew before Mr. Janney or Mr. Locker was on the board that they had been closely identified together in a business way. My information was from general reports. I remember of hearing that they had sort of contract which sought to dispose of some stock, but I am not clear on that. I do not remember whether the board held a meeting after receipt of letter marked Ex. 1 or not. We considered it, but not seriously.

Yes, I know where the \$2,900 came from that was deposited with the company. It came from either Mr. Locker or the Franco-Americane Banque to the company. I think they were cables. We took the money for it and said "Thank you." I presume the company issued stock for it. I don't know. The books of the company here would not show whether it had surrendered anything for that \$2,900.00 or not. The contract provides that certain money shall be paid to the company into the bank—the Franco-Americane Banque—and upon the payment to the bank certain stock shall be released, and we have confidence in that bank. I have never seen any

(Testimony of William M. Ferry.)

contract with the bank but I [117] know we have confidence in it. I think there is a contract between Mr. Locker and that bank. I never saw it. I have seen one or two contracts which he has entered into with the Underwriting Syndicates. He presented those to the company. I have frequently asked Mr. Janney to correspond with him, Mr. Locker, as to the status of the negotiations were. Generally things were done when they were to be done. We have received about two copies of contracts from him I think. No, when we received the twenty-nine hundred dollars. I don't think we got any letter from Locker explaining it. I did not see any, that is. Yes, I guess there was a letter and probably one or two cablegrams, and I believe the board directed the Franco-Americane Banque to deposit by wire with its New York correspondent as soon as the money was received by them.

There was a resolution passed by the board directing the secretary to notify both Mr. Locker and the Franco-Americane Banque that there was a suit pending in this county for the appointment of a Receiver. It was spread upon the minutes. He did not notify the two fiscal agents—we did not have the contracts. No, we authorized Mr. Locker to enter into—as agent of the company—certain relations with underwriting interests. I wish to say that those underwriting contracts were not made direct with the company. I do not know whether the underwriting contracts were made by the authority to Locker under his power of attorney.

(Testimony of William M. Ferry.)

Cross-examination by Mr. EDWARDS.

Yes, I have only one hundred shares in this corporation. No, it is a fact that the small number of shares I have made me more careful, if anything. (Objected to as immaterial and incompetent.) The board of directors at all times considered all matters of which they had notice that involved the interest of the corporation. I have missed several meetings. I did not consider that Janney and Locker might be working together. I think that the contract Mr. Locker had with the company was absolutely fair. I think I was justly due the fifty dollars paid me the first month. The last number of certificates in the books was No. 4336. Dated March 18, 1911. Some of the books contain certificates which were not issued at all. For instance, Book J. The numbers of certificates not yet issued are 2702 to 2750, both inclusive. Book K, certificates Nos. 2751 to 3000, both inclusive, not issued. Book N, from [118] No. 3501 to 3750, both inclusive, not issued. Book O, from No. 3751 to 4000, both inclusive, not issued. Each book contained 250 certificates originally.

I have seen the pamphlet marked "Tenabo Mining Smelting Co." I saw it when elected director of company and many times afterwards. I saw it before elected to the board. At that time I knew Frank Knox, Heber M. Wells, William Spry, J. E. Frick, M. H. Walker and W. S. McCornick. Frank Knox is president of the National Bank of the Republic, at Salt Lake City. Heber M. Wells is Ex-Governor of the State and manager of the Utah

(Testimony of William M. Ferry.)

Savings & Trust Co. William Spry was and is Governor of the State of Utah. J. E. Frick is Supreme Justice of the State of Utah. M. H. Walker is president of Walker Brothers Bankers in this city. W. S. McCornick is president of McCornick & Co., bankers of this town. (Objection made—not proper for cross-examination.) I know Mr. McVichie. He is consulting mining engineer, well known and reliable in the western country. I knew Mr. Llew. Humphreys at the time I read the pamphlet. He is also a competent mining engineer. I read, at the time I saw this pamphlet, a letter bearing date Jany. 30, 1909, to P. B. Locker, signed by Llew Humphreys. I read also the letter dated Jan. 27, 1909, to Tenabo Mining & Smelting Co., signed by W. S. McCornick. I also saw the letter TO WHOM IT MAY CONCERN, signed by Heber M. Wells. I saw letter to H. P. Clark, Cashier Commercial National Bank, signed by David Keith. Mr. Keith is one of the most prominent citizens in our community, a man of great mining experience. Read letter to Dr. H. Waggoner, signed by R. W. Schultz. I do not know him. Read letter signed by David L. Rockwell to Chas. P. Salen. I do not know him. Read letter TO WHOM IT MAY CONCERN, addressed by H. P. Clark, R. T. Badger, H. C. Edwards, C. S. Varian and Lester D. Freed. I know each of them. Read report to Board of Directors of Tenabo Mining Smelting Co., Salt Lake City, signed by A. H. Brown. I do not know him (Brown). I have always believed all statements to be true.

(Testimony of William M. Ferry.)

Yes, the board instructed Mr. Janney, its secretary, to inform the Franco-Americane Banque after the first bill in equity was instituted that action had been taken. We either told Locker or the bank. We told either Locker or the bank that no more certificates would be delivered until the [119] further order of the board, due to the pendency of this action. These certificates were in the hands of the Franco-Americane Banque, I think. They were "bearer certificates," issued by the trustees in New York City, certifying that certain shares of stock were held there in trust and that this certificate ran to the bearer of it and entitled them to the interest in the stock which was deposited with the trust company in New York. Prior to the time this \$2,900 was received, the board permitted to be sold a certain number of shares of stock to raise this money. (Objection—not best evidence.) We had communications from Mr. Locker, our agent in France. (Objection.) And move to strike out the answer for the reason that it is not the best evidence. I supposed that the money must be paid before certificates were issued. I was never at any meeting at which the resolution in the minutes marked Ex. 3 was read.

(Recess until 2 P. M.)

I am a director in the Silver King Coalition Mines Co., at Park City; a director in the Mason Valley Mines Co., in Mason Mountain Dist. of Nevada, and director in the Yosemite Mining Co., at Bingham, Utah. Also director in a few smaller concerns.

The meetings held by this company were always

(Testimony of William M. Ferry.)

long. The board always went thoroughly into the details of all questions. I have *never influenced* by what Mr. Janney wanted any more than that of any other director. I was governed by my judgment of what I thought was most advantageous to the stockholders of the corporation.

Redirect Examination by Mr. SHANK.

I took the position that, as a director, I should protect the interests of the stockholders to my best judgment and ability. Mr. Edward O. Howard asked me to become a director in this corporation. I was supposed to have some little knowledge of mining affairs and was a friend to him. I did not know that Locker was indebted to the Walker Brothers Bank. I might have known that Janney was. I occasionally examined the notes and securities and affairs of the bank, being on the executive committee of the bank, and a member of the board of directors. I came into this corporation because Mr. Howard asked me to do so.

I want the Court to understand that I think possibly I may have known [120] that Janney was indebted to Walker Brothers Bank, as I occasionally took part on a committee to examine the notes and securities of the bank, being a member of the executive committee and a member of the board of directors of the bank, and I think that it may be that Janney was indebted to the bank about that time. I want this record to show and the Court to understand that with these large interests which I represent, I came into this corporation upon a one to ten dollar investment, and assumed these responsibilities purely be-

(Testimony of William M. Ferry.)

cause Mr. Howard asked me.

But I had no idea that the responsibilities connected with the matter were as heavy as they have been. I have not asked to resign. I do not know if Mr. Locker was indebted to anybody. I do not know that Mr. Janney owed the Walker bank anything. I did not know anything of the Locker contract until after I became a director of the company.

I understand that the French Bourse, upon representations substantiated and upon payment to the government, permits stock to be listed. That extends only to such stock as application is made for, and does not affect or afford a market for stock other than that particular bunch of stock or number of shares which has been represented and which had been paid for and the fees for which have all been attended to. In other words, the stock which we are negotiating to sell to the amount of four hundred and fifty thousand shares, if it should be sold, or should become listed upon the Bourse or Curb, would be the only stock which would be permitted by them to be dealt in, and such stock as we held, or such stock as might be in France or any other country, would have no standing in the market at all. The 450,000 shares of stock is in the hands of the Windsor Trust Co. as Trustee. However, the contract may provide that it may be put in the hands of the Franco-Americane Banque. The contract covering the disposition of the stock, the bearer certificates which are distinct from the stock of the company are in the hands of the bank, while an equal number of shares representing that issue

(Testimony of William M. Ferry.)

would be in the hands of the Windsor Trust Co.; so that these certificates may, at the option of the buyer or owner, be transferred and exchanged for this Trustee stock which is in the hands of the Windsor Trust Company. That is my understanding of it. This is all covered by a contract between the company and the Windsor Trust Co., or perhaps a contract [121] between the company and Locker, or else a contract between Mr. Locker as the representative of the company and the Windsor Trust Co., direct. I think I have seen them in our office. I rather think it was the Windsor Trust Co., and the Tenabo Mining & Smelting Co., in which they act as Trustee for this 450,000 shares. I, as president, would have signed it. But I don't remember signing it.

I think the Windsor Trust Co. has the 450,000 shares of stock. I don't know if they have them all or not. I don't know if they were transferred to the Banque or not. I have never seen a French bearer certificate. The only thing I know is that we received \$2,900, and some dollars for some. I have never asked Mr. Locker or the Banque to account upon those sales. I have examined the books and think all are signed, that is, in books J, K, N, O, and Q. They have also been signed by Mr. Janney. The registrar and transfer agent both have to check them and affix their signatures before they are negotiable, or properly issued. The company requires those signatures before the stock becomes issued. I do not know where stock books B and C are. I do not know how many stock certificate books we issued, nor how

(Testimony of William M. Ferry.)

many shares of stock were originally printed or lithographed, nor how many I signed as president, but I think several thousand. I think two thousand shares of stock were lithographed for the company, originally. I do not know to whom Cert. No. 106 was issued. Neither Nos. 110 to 129, inclusive. They appear in the blank. I do not know to whom Nos. 131 to 152, inclusive, were issued to. Neither 154 to 156, inclusive. Neither 158 to 168; 170 to 204; 206 to 208; neither Nos. 1039 to 1200; 1454; 1455; 1457 to 1460; 1462 to 1500, both inclusive. I do not know to whom or for what amount 1502 to 1750 were issued, nor where the certificates are at the present time. My answer is the same as to all the stubs of certificates from which the certificates are taken. They were all signed by me. I do not know to whom they were issued. 1752 to 1950, inclusive; 1957 to 1960, inclusive; 2023 to 2031; 2043 to 2141, inclusive; 2143 to 2193, inclusive; 2200 to 2241, inclusive; 2246 to 2250; 2252 to 2450, inclusive; 3213 to 3250; 2502 to 2592; 2596 to 2674; 2676 to 2679, inclusive; 2693 and 2694, and 2696 to 2699; 3252 to 2410, 3412 to 3415; 3416, 3417, 3418, 3419 and 3420. They were signed by [122] me; 3436 to 3494. I do not know to whom they were issued; 3496 to 3500, 3252 to 3500. All the others being 4096 to 4197, 4149 to 4171, 4172 to 4196, 4198 to 4222, 4432 to 4250, 4252 to 4360, I do not know to whom they are issued unless the name appears on them. 7604 shares were issued to M. H. Walker, of Walker Bros. Bank.

The last stockholders' meeting was held on Feb.

(Testimony of William M. Ferry.)

12th of this year. I think there was one in May, 1911. I was present but Mr. Benner X. Smith presided. I was late. There was a little trouble and the Anti-Tyree faction elected the board. I was an anti. I was delayed, and when I arrived I found that Mr. Smith was in the chair and Mr. Price, an attorney, was apparently representing the Tyree interest. Mr. Skeen and Mr. Janney were there; a committee on credentials was appointed, and Mr. Price made some strong remarks, and an adjournment was had, in which the committee examined the credentials and when the meeting reassembled and reported, the report was adopted; thereupon an election for the board of directors for the ensuing year was had, and different sets of nominations were made, and the election was had. The chair declared the present board of directors elected. I am sure the minutes would show what Mr. Price would want spread upon them. Mr. Price had proxies from several men, and wanted to control the election. Those credentials are supposedly filed in the secretary's office.

Cross-examination by Mr. EDWARDS.

Yes, the committee on credentials made a report recognizing the majority of the stock as being entitled to be voted against the Tyree interests, but finally there was a majority of the stock represented at the meeting voted for the election of the present board, and since that time no action has been taken by the parties that Mr. Price voted the stock represented by him at the election to question the election

(Testimony of William M. Ferry.)
of the present board.

Yes, it is true that all the certificate books signed by me and by Mr. Janney had been forwarded to the Windsor Trust Company. All stock certificates issued from those books were issued and torn from those books after the Tenabo Mining & Smelting Co. had transported the books to the Windsor Trust Co. I do not know whether Mr. Janney kept a stock ledger or not. I think the Windsor Trust Co. rendered statements at intervals to Mr. Janney [123] as to the number of shares evidenced by each certificate that was issued by it. I never paid any attention before to the stubs on some of the certificates not being filled out. I do not know why they were kept blank. All of them had engraving on them.

Redirect Examination by Mr. SHANK.

(Ex. 4 made and attached to deposition.)

That is the general form used by the Tenabo Mining & Smelting Co. The reports from the Trust Co. came in sheets with the proper certificate showing the status of the stock issue of that date. I know Mr. Janney received them, but I do not know where he kept them.

Cross-examination by Mr. EDWARDS.

That is the form (Ex. 4) in manner of engraving and general aspect of the certificates.

(Witness excused.)

[Testimony of John Pingree, for Plaintiff.]

JOHN PINGREE, witness produced by complainant, testifies:

My name is John Pingree. I reside at Ogden. I am cashier of the First National Bank, having been such since Jany. 1904. I have resided in Utah all my life. I became identified with this company the early part of 1910—the latter part of February, I think, as an officer. I had one hundred shares in the company. I paid nothing for it. It came through the mail to me. I think it came from Mr. Janney. It was about the time I was elected upon the board of trustees. Mr. Janney asked me to go on the board of directors. He said that on account of holdings I had and on account of the change in the board that he would like me to serve. I have met Mr. Locker, I first learned of the contract of Locker's at the directors' meeting. It was generally discussed. I don't remember whether or not Mr. Locker was present. I do not know that Mr. Janney represented Mr. Locker, but he brought up all matters generally. I attended three or four meetings. I remember Locker was at one meeting before he left for Paris. Both Mr. Locker and Mr. Janney presented the matter of the Locker contract to the board. I made no inquiry as to the prior condition of the company, or of Mr. Locker or Mr. Janney. I understood that Mr. Tyree had the swing of the previous board. That what the reason for the change. I had heard something [124] to the effect that Locker had transferred his holdings in the Tenabo Mining & Smelting

(Testimony of John Pingree.)

Co. under the name of the Tenabo Consolidated Co. I had heard that the holdings Tyree transferred to the company were the Gem Consolidated. I never knew that Tyree had elected three members on the board and Locker two. All I know is that one day I was called and asked if I had objections to being left off the board for the reason that they wanted to put Mr. Skeen on, and I said "No"; that it was entirely agreeable to me, and I had not heard anything to the contrary and I never have requalified, and if I am a member now, it is simply from the fact that Mr. Skeen did not qualify, and if he has, perhaps I am not a member. I am not active, and have not been active since the early part of 1911. I have not attended a meeting since the early part of 1911. I have ceased interesting myself in any way, shape or form with the transactions of this company since the early part of 1911. Know nothing of the transactions of the company. I know nothing of the receipt of any money. They always seemed to wonder where the money was coming from. They always needed money.

I was present, I think, when the contract with Locker and the power of attorney were considered. I cannot say I was very favorably impressed with it, but it seemed the only way to do what we wanted, to get the company fifty cents net for stock. I do not know what the stock had been selling for prior to that time. Locker was to net the company 50¢ per share on the French market. I heard the machinery of it discussed in the directors' meeting, and it met

(Testimony of John Pingree.)

with my approval. I do not know anything of Mr. Locker's deals or whether he ever sold any stock. I know nothing about the company, have had no knowledge as to where the books were kept, how they were handled, the contract or agreement with the Windsor Trust Co., or the French Banque, and have never had anything to do with or seen the books of the company. I do not know where Mr. Janney is.

Cross-examination by Mr. EDWARDS.

I did hold a large block of stock in the Gem Consolidated Mining Co. Together with my associates, I held some 80,000 shares. We exchanged our stock in that company to stock in the Tenabo Company, on the basis of three to one, I think. Three shares of Gem for one share of Tenabo. I knew Mr. Janney only casually at the time I was elected to the board. Did not think of in any way trying to engineer the affair when I went in. I did not think the Locker contract was especially advantageous to the company, but thought it was the best we could do with anyone at the time. I think I attended from eight to ten meetings of the company during the year. Most [125] of them were long.

I have always thought the mining properties valuable. I know Duncan McVichie, Llew Humphreys, and think they are very fine mining authorities and trust them implicitly. They are both of fine reputations in this country. I thought the mines were so good that I made a loan on them. (Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.) It was made on the stock

(Testimony of John Pingree.)

of the Reliance Mining & Milling Company, on 200,000 shares of it. I got some 50,000 shares from Tyree.

Redirect Examination by Mr. SHANK.

I was never able to get my stock in the Gem Consolidated transferred to my name. Most of it is in the name of Hiram Tyree. I tried several times, but they always told me the stock issued in a certificate in their name, but it was in the pool agreement. Tyree and Locker made that agreement. I know nothing about the terms of that agreement. I haven't any idea when that pool agreement will be closed so that I can get my stock, or whether I will ever be able to get it. I received one check for \$50.00 and did about three or four hundred dollars' worth of work, I think. I paid out a great deal in railroad fares.

Cross-examination by Mr. EDWARDS.

I do not know anything about who named the different directors. (List of stockholders offered in evidence and ordered copied by Examiner and attached to these depositions as an exhibit in this case. Marked Ex. 5.)

(Adjournment until Feb. 22, 1912, 10 A. M.)

Thurs., Feb. 22, 1912.

[Testimony of Benner X. Smith, for Plaintiff.]

BENNER X. SMITH, witness for complainant, testified:

My name is Benner X. Smith. I reside in Salt Lake City, Utah. I am an attorney at law. Ad-

(Testimony of Benner X. Smith.)

mitted to the bar in New York City in June, 1892. Have practiced here since Sept., 1892, with the exception of the year 1898, when I was in the army. I am a director of the Tenabo Mining & Smelting Co., and also its attorney. I have been such since February, 1910, shortly after I was made director. I owned one hundred shares of stock in the company. I got the certificate from John Janney. It appeared to have been transferred [126] from Arthur Johns. I think possibly I paid a dollar for it. Mr. Howard and Mr. Janney jointly requested me to become a director. Our firm has never done any business for Walker Bros. except a few little collections. I had known Mr. Janney slightly and Mr. Howard very well. Howard stated to me in a general way about the company and that he had suggested to Mr. Janney that I go on the board, and said Mr. Janney was reorganizing it, and he had told Mr. Janney that if they would make our firm their attorneys, probably I would go on the board. I investigated the mine, as I did not want to be mixed up with a wild-cat mining prospect, and I looked over the prospectus and talked with Mr. Duncan McVichie about it, as he was a mining engineer and would know more about it. I think I talked with Mr. Ferry also. I did not know Mr. Locker at that time, although I knew him by reputation. I first learned of the arrangement with Mr. Locker for the sale of stock about the time we were elected on the board, or shortly afterwards. The French contract was brought to the board's attention shortly after we were elected, by Mr. Janney, to-

(Testimony of Benner X. Smith.)

gether with a form of a trust agreement which would provide the machinery for the issuance of bearer certificates and placing them upon the French market, and some correspondence from a New York firm, who approved the form of the contract. I drew the French contract, following to a great extent the form that I have spoken of. Mr. Janney presented that form to me. I had discussed the form with Mr. Locker and with Mr. Janney to some extent. The board was elected on the 8th or 9th of February, and five certificates of stock of a hundred shares each were placed in my hands, as also in the hands of other directors, and I sent them to the Windsor Trust Co. for transfer. I received a reply from them. Yes, I have it here. (Hands letter to counsel.) The power of attorney was a special one given to Mr. Locker. There was a time after the Locker contract when Mr. Tyree commenced to interfere, and I don't know but what it was at that time that I received the information of the issuance of some stock, I don't remember how much, to the Gem Co. I was told, I think, that it was issued to the Gem Co., and went into the manual possession of Hiram Tyree. (Objection, hearsay.)

At the time of the filing of the first bill in equity by Mr. Skeen against this company, there was some conversation with Mr. Skeen with [127] reference to some notes that were given at some place in New York. It seems that it was in Cornell—no, Hornell. I do not recollect the person as being Adsit. It was in May or June, 1911. This was called to my attention, tending to show the connection of Mr. Locker

(Testimony of Benner X. Smith.)

and Mr. Janney, that is, their connection with each other and their participation in that transaction that was referred to. (Note handed to him.) All I recollect about that note was that it was endorsed by Hiram Tyree, P. B. Locker and John Janney. I don't remember the endorsement of the company on it. I was told, on my election to the board, that all the directors would receive fifty dollars per month. I received fifty dollars. I think our firm received \$150.00 as attorney's fees. It was in 1910, I think, I have not seen the property. I have produced all the documents which I have connected with the company. They consist of drafts of contracts, drafts of minutes of meetings, form of a trust agreement between the Windsor Trust Co., and the company and others. I have one passed upon by Coudert Bros. I think there were some modifications made in it. It was not executed as it is there. I did not draft it; it was sent me by the Windsor Trust Co. It came from a firm of lawyers in New York, I suppose. A letter from Coudert Bros. came with it. I think it came to Mr. Locker. I suppose Mr. Janney has the letter. (Note marked Ex. 6.) (Objected to unless offered in evidence.) This form of trust agreement was followed, with some modifications, when the agreement was finally executed. (Objection, incompetent.) The Locker contract was drawn up by me after he (Locker) had stated to the board different propositions. Several of them were turned down by the board. I drew what is known as the French contract following the form of contract presented to the

(Testimony of Benner X. Smith.)

board by Mr. Locker. I think there is a correct copy of the contract with the Franco-Americane Banque in the office of the company. The form is incorporated in the special power of attorney for Locker. He, I suppose, has reported what he has done under the power of attorney for the company, and what contracts he has signed. That would be in the minutes, I think, or the files. One time, I suggested to the board that I thought he ought to report direct to the company, as he always reported to Mr. Janney. I think the company received a report as to the number of certificates sold in Paris. [128]

In November, 1911, it was made after arrangements had been made with the board to direct the Franco-Americane Banque release, upon payment of a certain sum of money, certain bearer certificates, and the bank was directed to so release, and the company received the money. I think thirty thousand shares were ordered released for three thousand dollars. Locker was to receive no share of this amount. We received that amount, less the cost of remitting it. It was carried on through Locker. There was a resolution passed and I presume it is in the minutes of the board. I do not know of any release reported to the board. I do not know that the company has received any letters from Mr. Locker since receipt of that money. We had to have funds to do the assessment work upon this property for 1911, and the matter was taken up by the board, and Mr. Janney was directed to advise Mr. Locker of the situation. We were advised that there could be

(Testimony of Benner X. Smith.)

funds raised if we would release this amount of stock. Mr. Janney advised me. He said he took the matter up with Mr. Locker. I am sure the books will disclose all, as I helped draw up the minutes. I do not know where the books are. Mr. Janney has never gone away before that I know of without leaving the key to his desk with someone.

He has never before locked his office and gone away for weeks and not reported to counsel for the company or the board of directors, or other officers, anything about the minute book or about the records of the company. I do not know whether his office is kept up while he is away or not. We have not had a directors' meeting since Mr. Janney left. I do not know to whom those French bearer certificates were sold. I don't know whether Locker got anything out of it or not. We were satisfied in order to raise this money to let those certificates go. We expected to sell enough of Janney's stock in order to make up the difference between that and that which we received from those bearer certificates at fifty cents a share. It is all spread upon the minutes. I generally draw up the minutes. I know of no other contracts with Locker except as set out in Exhibit No. 1. That was a request to be released from the contract. The board turned it down. [129]

Cross-examination by Mr. EDWARDS.

I had no understanding with anyone of any kind by which I was not to exercise my honest discretion in transacting business of the company. I have *taken used* my best judgment and have used more

(Testimony of Benner X. Smith.)

care than I would have in some instances where I had larger holdings. The objection is found on page 25 of Smith's deposition as incompetent and self-serving. I don't recall who told me that the stock of the Gem had been delivered to Tyree. I know Mr. Tyree was one of the officers of the Gem Co., and I assumed that he got the stock. The promissory note for \$5,000 was signed by the Gem Consolidated Mining Co., by Tyree as president, and by the Nevada Phoenix Mining Co., by Locker, as president, and by the Tenabo Consolidated Mining & Milling Co., by Locker, as president. It was not signed by the Tenabo Mining & Smelting Co., to my knowledge.

No, I do not remember what parts of the form of the Trust Agreement was used by me in drawing the contract which was ultimately executed. Instruction was given by wire, I think, to the Franco-Americane Bank to deliver bearer certificates upon payment of three thousand dollars. Miss Robertson had constantly been in Mr. Janney's office, so far as I know, since I have been director. I have frequently called at the office for copies of papers. Miss Robertson is at present in Nevada, on a vacation.

Redirect Examination by Mr. SHANK.

I do not recall that Mr. Tyree executed a note of the company to Mr. Bloom for *thirty-five thousand* \$35,000.00. Mr. Skeen spoke of many matters to me and he might have mentioned it, but I do not remember it. I have heard that there was a block of stock, 135,000 shares, disposed of by Mr. Tyree, putting it up as collateral upon a note and borrowing money

(Testimony of Benner X. Smith.)

on it, and I believe the stock was converted under the terms of the note for nonpayment of the note. Yes, I know of that. That happened before I was connected with the company. I don't know whether there is at present outstanding an obligation of the defendant company executed by Hiram Tyree or not. That was not the note of Hiram Tyree. Some individual in New York executed it, and this stock was pledged as collateral and the money was raised on it, but it wasn't the note of the company. [130]

Cross-examination by Mr. EDWARDS.

I really don't know anything about that note of my own knowledge. I remember there is a record in the minutes of the company of a contract given to Mr. P. B. Locker. Yes, I remember of hearing something about Tyree and Locker having hypothecated one hundred thousand shares of stock bought from the company as collateral and that the other shares of stock had been retained by them for their personal use. There has never been a demand on the company by Bloom or anyone else holding a note purporting to have been executed by the company or anyone on its behalf.

Redirect Examination by Mr. SHANK.

The mortgage of fifteen hundred dollars was placed in the hands of Salt Lake lawyers—I think C. S. Price. There was \$500 paid on it and interest to May 16th and was extended. I presume Mr. Raleigh is in charge of the mines now. He received no salary. He does our assessment work and looks over matters generally.

(Recess until 2 P. M.)

[Testimony of Charles S. Varian, for Plaintiff.]

Mr. CHARLES S. VARIAN, witness produced by complainant, testified:

My name is Charles S. Varian. I reside in Salt Lake City. I am a lawyer; have been for 40 or 41 years. Have had an office here since 1883. I have always considered myself not a stockholder. I had a hundred shares. H. P. Clark, Rodney T. Badger, Lester Freed, H. C. Edwards and myself were the incorporators of the company. Mr. McCornick, Mr. Tyree and one or two of the above-named gentlemen asked me to go in. I was a subscriber for stock, 100 shares, but do not know that I ever received a certificate for it. I have no recollection of having the certificate or transferring it, unless I transferred it to the secretary of the succeeding board, Mr. Janney. I dismissed it from my mind and never thought of myself as having any stock in it. I think Mr. Clark was elected president and Mr. Badger secretary and treasurer. I was appointed counsel. I was director until about the first of February, 1910. I wanted to go out because I found that it took so much time, and the property was situated in Nevada, and the stock was [131] being dealt with on the market, not safely, and after we had succeeded in paying off that mortgage, I concluded I wanted to get off and out. It all related to the placing of the stock. I believe the Locker and French contracts were pending several months before I resigned. I made up my mind I would not execute it. I think that contract was executed in March, 1910. I find here my office

(Testimony of Charles S. Varian.)

copy of the record of meeting of directors on Oct. 4, 1909, referring to the contract previously made with Locker and cancelled here. It is as follows:

“Upon motion of Director Edwards, seconded by Director Freed, the following resolution was unanimously adopted: Whereas, an option contract for the sale of 600,000 shares of the treasury stock of this company by P. B. Locker was made by and between this company and the said Locker, on the 14th day of January, 1909; and whereas, the said contract was not complied with, nor fulfilled by the said Locker, and was cancelled by resolution of this board taking effect on the 15th day of July, A. D. 1909, and due notice thereof in writing given to said Locker and Hiram Tyree and J. W. Janney, assignees of an interest in said contract; and, whereas, by resolution adopted by the board on the 19th day of July, A. D. 1909, the said Locker and the said Janney were appointed the agents of this company, with authority to sell for cash at not less than fifty cents per share, the remainder of the treasury stock of this company, yet unsold of the block of 600,000 shares, authorized to be sold by the aforesaid contract of January 14th, A. D. 1909; and, whereas, it was, by said last mentioned resolution, provided that the authority thereby conferred upon said Locker and said Janney should terminate, and be considered revoked without further action of this board, upon the expiration of sixty days, from the said 19th day of July, A. D. 1909, and, whereas, an indebtedness of approximately \$20,000.00 (including interest), charged against the ‘Gem,’

(Testimony of Charles S. Varian.)

'Reno,' 'Ollie' and 'Winnemucca' mining claims, the property of this company, by mortgage in favor of W. S. McCornick is past and due, and in suit for foreclosure in the District Court for Lander County, State of Nevada, and, whereas, a suit is also pending in said court for the foreclosure of a miners' or laborers' lien filed against the said last above-named property to recover the sum of \$2,779.00 with \$500.00 attorney's fees, interest and costs, and, whereas, the annual work to be done upon the fourteen mining claims, the property of this company, has not been done for the current year, and must be done by and before the first day of January, A. D. 1910, and the sum of \$1660 is required for the performance and superintendence of said work; and whereas, this company has no money for the satisfaction of the aforesaid claims and charges, or for such part thereof as may be found to be justly chargeable against the company's property, and it is necessary that the company should have immediately the sum of \$25,000.00 for the purposes aforesaid and its necessary expenses and charges; and whereas, the company has no other means whereby to procure said or any sums of money other than by the sale of its treasury stock;

Now, therefore, be it resolved: That this company offers for sale and will sell for the sum of \$25,000.00 in cash, so much of its treasury stock yet unsold as may be necessary to procure said sum at once, and hereby invites bids from responsible persons for the same; provided, nevertheless, that no stock shall be sold, issued, or delivered, until and unless, the amount

(Testimony of Charles S. Varian.)

of money to be paid to this company for the entire number of shares [132] hereby authorized to be sold shall aggregate the full sum of \$25,000.00; the intention being to sell no more of the treasury stock, unless enough shares can be sold to net the company said sum.

And the secretary is directed to forward certified copies of this resolution to the Windsor Trust Company.

P. B. LOCKER,
J. W. JANNEY and
HIRAM TYREE.”

I recollect no contract after that disposition of the matter was made, but there was one asked, as I remember, requested by Locker, which involved the putting of the stock of this company on the Paris Bourse, subject to the rules and regulations and the laws of the department of the Seine, or of Paris; and we refused to do it. I did not want to execute it because I had no confidence at that time in the agent, P. B. Locker. I do not remember whether Exhibit No. 1 is a contract similar to the one asked from the board for the sale of these certificates in Paris or not. I do not remember or know anything of a power of attorney to Locker. The resolution just read was passed on October 4, 1909. The money procured came through McCornick & Sons in New York. The record shows 165,000 shares *deliver* up for \$25,000, I believe. I don't know positively how many. I never heard that Tyree kept ten thousand dollars and also sixty-five thousand shares. I think we refused

(Testimony of Charles S. Varian.)

to release the Gem or Reliance stock. The 450,000 shares of stock issued to the Gem Co. were deposited in either the first or second trust company. I don't know what relations existed between Tyree and Locker, but I was convinced that they were working together against the company and I said as much in one of our directors' meetings. I think I have letters bearing on these matters, but I have not had time to gather them together. I will not allow those letters taken away from me. They are for my protection.

I defended an action brought here in 1909 against the Tenabo Co., making charges against the directors of both companies. I found it very difficult to dispose of the stock of this company. All I know about the French contract is that it was presented to the board by Mr. Janney and was turned down. When we organized the company, we did not have any money, and Mr. Locker paid all the expenses necessary to start the office with, and we subsequently reimbursed him. We gave him a contract to sell this stock at fifty cents a share. The board voted a salary of \$50.00 per month to the secretary and gave Lester Freed and Clark—I don't remember whether Edwards got it or not. My salary was fixed at fifty dollars, with the [133] understanding that it did not include suits in court or litigation. The \$1,025.45 paid to Mr. Edwards was, I think, fees in the foreclosure of that mortgage. Yes, I received \$700.00 prior to the time that I resigned. I do not know about the money paid to the various officers. Mr. Clark did much work in

(Testimony of Charles S. Varian.)

employing men to work, etc. He saw that the assessment work was done and that the secretary's work was done. We made all the efforts we could to sell the stock with the market 2,000 miles away. Besides the 2,250 shares for which they were paid \$1,687.50 and the 165,000 shares for which they were paid \$25,000, there was some stock sold in New York and accounted for by the Trust Companies. Locker sold some stock here to Hagenbarth and Frank Knox, I think. He either turned it in or accounted for it.

Cross-examination by Mr. EDWARDS.

All the capital stock was paid for by the stockholders. All the stock books were sent down to New York before any stock certificates were issued. I don't remember ever having a stock certificate myself. I did not receive one from the Trust Company. I never assigned any. Yes, at the meeting had with reference to the French contract, I made it very clear to Mr. Janney just what I thought about it. I said we would not transact any more business for the corporation with Locker or Janney. He, Janney said, "Why don't you get out then?" We said we would as soon as they could find another board to succeed us. I said we would not appoint anyone connected with Tyree or Locker. The names presented were Benner X. Smith and E. O. Howard, whom I knew very well. Also Mont Ferry and John Pingree, of Ogden, and Janney himself.

I read the contract over, and took it home and studied it some more, and became convinced that I would not stand for it. The French board was too

(Testimony of Charles S. Varian.)

far away and I did not think the company was in a position to comply with the laws of France as to expense, or as to the supervision of the sale of the stock. I stated my position to the board next day, and they all agreed with me. This contract was not the same as the one presented to the former board. This contract involved the expenditure of considerable money for office, etc. I did not think the company could afford to undertake such a thing as that. [134] Locker's contract was at first only to sell stock. We cancelled that and before that there was an option. A number of contracts were turned down. Every matter presented to the board was thoroughly discussed before they were acted upon.

When I became a director in this corporation, I knew that McCornick & Co. had instituted suit to foreclose a mortgage that had been given to them upon the Little Gem mining claim, and we sent to get an abstract of title to the properties and one of the deeds—to the Ollie and Winnemucca—was not included. We never discovered it for a year. That was one of the things I told Tyree about in a letter and he said he didn't know anything about it. We afterwards found that the deed had been executed and deposited with W. S. McCornick in escrow to be delivered to Gallagher when a certain sum of money was paid as the remaining portion of the purchase price. A part of the \$25,000 which was received from the sale of the stock of the corporation was used for the purpose of paying up the balance of the pur-

(Testimony of Charles S. Varian.)

chase price and having a title vested in the defendant corporation.

I remember there was a lien—mechanic's—that was not in the abstract. It was made by a man named Seeman, in Philadelphia. I found that the deeds to the Ollie, Winnemucca and Reno claims were held in escrow for \$21,500.00 and that Gallagher was trustee. We paid \$75.00 attorney's fees to get the papers out; then we had to get a deed from Gallagher. When the \$25,000 was received, all the liabilities of the company were found out, and this mortgage was found unsatisfied, and the secretary reported the status, and we took his word for it. I think the fee was \$1,000.00. I was attorney at first, but before that other came up I think I turned over the matter to Mr. Smith. I was always fair and square.

Redirect Examination by Mr. SHANK.

I was opposed to the French contract—I mean the contract with Locker—because of the amount the company must put up, the fact that they must sustain offices over in France for three years, submission to the French law, and the agent put in charge over there.

Cross-examination by Mr. EDWARDS.

I think we had to give bond in France, appoint an agent and so on. I [135] objected inasmuch as we did not know enough about French law to be safe in attempting to read or interpret it.

Redirect Examination by Mr. SHANK.

No, I thought that an American company operat-

(Testimony of Charles S. Varian.)

ing in France ought to be in a position to be advised by lawyers who were acquainted with French law. I know nothing about French certificates.

Cross-examination by Mr. EDWARDS.

I do not remember having had submitted to me any stock certificates of any kind. In fact, the board never tried to raise money to transact its business except through the contracts made by the board with Locker and with McCornick Brothers.

Redirect Examination by Mr. SHANK.

I do not know as we tried to borrow money upon the credit of the corporation. We all knew that our only source of revenue was the sale of capital stock.

Cross-examination by Mr. EDWARDS.

After the mortgage was paid off, we never tried to raise money.

(Adjournment to February 23, 1912, 10 A. M.)

Friday, February 23, 1912, 10 A. M.

[Testimony of Lester D. Freed, for Plaintiff.]

LESTER D. FREED, witness for complainant, testified:

My name is Lester D. Freed. I reside in Salt Lake City, Utah, and have for twenty-two years. I am in the furniture business. I was formerly a member of the board of directors of the Tenabo Mining & Smelting Co. I guess I was an incorporator. I was never any other officer. I faintly remember the contract submitted the company for sale of stock in France by Mr. P. B. Locker. I think he presented it himself. Janney did not have anything to

(Testimony of Lester D. Freed.)

do with it that I know of then. I think there was paid to me something like \$550 for being a member of the board. I never saw the properties of the company.

Cross-examination by Mr. EDWARDS.

I do remember that the capital stock of the corporation was paid for by deeding to it the mining properties of the Gem Consolidated and the Tenabo Consolidated Mining & Smelting Co., which companies were controlled [136] respectively by Locker and Tyree. I have never gotten the stock and don't know how it was paid for or anything about it. I was to get the 100 shares for being on the board of directors. The Trust Company in New York never sent me a certificate for my stock. I never transferred any stock. We all resigned together, at the same time. They were accepted and others put in. Yes, Locker presented a contract to the board shortly after I handed my resignation in, but it was turned down. We had many meetings, and I used my own judgment and was not influenced by anyone. I am willing to abide by the minutes.

Redirect Examination by Mr. SHANK.

I think Mr. H. P. Clark requested me to become an incorporator of this company. I am connected with him in different enterprises. I had no personal investment in the corporation excepting the stock I was entitled to. I have mentioned the fact that I wanted my stock at directors' meetings, but did not receive it.

Cross-examination by Mr. EDWARDS.

I became a member of the board of directors on

(Testimony of Lester D. Freed.)

account of my close relations with Mr. Clark and my desire to accommodate him. I have not visited the properties but have investigated the merits of them. I perused Ex. 2 carefully. I knew Mr. McVichie at that time and knew his standing as a mining engineer. I also knew Wm. Spry, Llew Humphreys, Frank Knox, Heber M. Wells, J. E. Frick, M. H. Walker, W. S. McCornick, David Keith, and knew that they all stood high in the community, etc.

Cross-examination by Mr. EDWARDS.

I resigned because I did not like the way the entire proposition was being handled. I was spending more time than I could afford on the board.

Redirect Examination by Mr. SHANK.

No, I did not like the way things were handled. I have reference to Locker and Janney and Tyree and possibly W. S. McCornick. I understood that Tyree had some connection with another company which this company absorbed. I thought the contract Locker and Janney were trying to get from the company was in pursuance of some scheme between them. Locker was supposed to have the stock in charge and the sale of it. [137]

Cross-examination by Mr. EDWARDS.

I simply knew there was a friction between Tyree, Locker and Janney and that one or the other was constantly trying to get a contract from the board, leaving out the other party. I understand that the Tenabo Mining & Smelting Co. took over the other two corporations in stock and consolidated them.

(Testimony of Lester D. Freed.)

Locker simply handled the contracts through the board and that is the only way he controlled the stock. He had nothing else to do with the running of the company. There were some transactions Mr. Tyree tried to get through by means of McCornick & Co. It was that they requested the board to trade in its stock upon the New York curb. Also, Mr. Tyree owed Mr. McCornick considerable money and Tyree made a sale of 1,000 or more shares and we would not pass on it, for we thought we had such a large mortgage and could not do it.

(Witness excused.)

Complainant's Exhibit No. 2 [Division of Stock].

HOTEL IMPERIAL.

Hotel Imperial.

Broadway 31st and 32d Streets, New
York.

Robert Stafford, Proprietor.

Cable address: "Imperial"

Copeland Townsend, Manager.

Telephone 6100 Madison.

New York, June 25th—08.

Memorandum of Agreement of Division of Stock.
To form a Consolidated Company of 1,500,000 shares of which 500,000 shares to be treasury stock. Highland to have 500,000 shares of stock at 25¢ a share—300,000 shares treasury stock and 200,000 shares outstanding stock. This leaves 800,000 shares of outstanding stock to be distributed as follows:

400,000 shares to go to pay for Little Gem properties.

300,000 shares to go to pay for Tenabo Consolidated properties.

100,000 shares remaining and also the proceeds

from the sale of 200,000 shares of outstanding stock to Highland is to be equally divided between Tyree, one half, and Locker & Janney, one half.

H. TYREE.

JOHN JANNEY.

[Endorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. Mem. of Division of Stock. Complainant's Exhibit No. 2. Filed Septr. 5th, 1912. T. J. Edwards, Clerk. [138]

**Complainant's Exhibit No. 4 [Letter, April 15, 1909,
P. B. Locker to R. T. Badger].**

THE STRATFORD HOTEL CO.

Michigan and Jackson Boulevards.

Chicago.

April 15th, '09.

Mr. R. T. Badger, Treas.,
Tenabo Mining & Smelting Co.,
Utah National Bank,
Salt Lake City, Utah.

Dear Sir:—

Attached hereto is a copy of the letter that I have this day addressed to The Windsor Trust Co., of New York City. A copy of the application and receipt given is also hereto attached.

The price at which the stock is sold is 75¢ per share. The amount of money remitted is \$1,425.00, all in the form of certified checks. Of this amount, \$285.00 is the company's net, and that due me is \$1140.00.

Another remittance will be sent in this week which

should amount to considerable more than that sent today.

Very truly yours,

P. B. LOCKER.

April 14th, '09.

Windsor Trust Co.,
32 Nassau St.,
New York City, N. Y.

Gentlemen:—

Enclosed you will please find applications for stock in the Tenabo Mining & Smelting Co., with certified checks in settlement therefor as follows:

Name.	No. of Shares.	Amount.
Chas. C. Williams.	500	\$375.00
R. C. Wilson.	500	375.00
Raymond Reed Phelps.	500	375.00
L. H. Reinking.	300	225.00
Edward R. Newcomb.	100	75.00

Total, 1900 Total, \$1425.00

You will please issue certificates in accordance with application, and deposit cash to the credit of The Tenabo Mining & Smelting Co.

Very truly yours,

APPLICATION.

——— Shares. No. 1.

TENABO MINING AND SMELTING COMPANY.

Capital stock 1,500,000 shares. Par Value \$2.00 each. Treasury Stock 750,000 shares. Fully paid and non-assessable. Mines at Tenabo, Lander Co.,

222 *Tenabo Mining and Smelting Company*

Nevada. I hereby apply for ——— Shares of the Capital Stock of the Tenabo Mining and Smelting Company, at the price of seventy-five (75) cents per share, for which I hereto attach current exchange for ——— dollars, payable to the Tenabo Mining and Smelting Company, for which I hold receipt No. 1, in consideration of the price at which this stock is purchased, I hereby agree that the certificate for said stock shall be held by the Windsor Trust Company until November 15th, 1909, and then mailed to ———. Signature ———. Address ———.

————— 19———

Issued Receipt No. 1.

To ——— Address ——— Certified Check ———
dollars.

Shares ——— \$——— for New York Draft.

—————, Agent. [139]

——— Shares.

No. 1.

RECEIPT PENDING ISSUANCE OF CERTIFICATE.

TENABO MINING AND SMELTING COMPANY.

Fully paid and non-assessable.

Capital stock 1,500,000 shares. Par value \$2.00 each. Treasury stock, 750,000 shares. Mines at Tenabo, Lander Co., Nevada.

Received of ——— ——— 190—— of ——— current exchange for ——— dollars, payable to the Tenabo Mining and Smelting Company for deposit to the account of said company with the Windsor Trust Company of New York, depository, being payment in full for ——— shares of the Capital Stock

of said Tenabo Mining and Smelting Company at seventy-five (75c) cents per share, as per application No. 1. Certificate for said stock to be held by the said Windsor Trust Company until November 15th, 1909, and then delivered by mail as per application. Tenabo Mining and Smelting Company. By ———. Form W. A.

[Endorsed]: No. 1173. U. S. District Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. Report of Treasurer. Complainant's Exhibit No. 4. Filed September 6, 1912. T. J. Edwards, Clerk.

**Complainant's Exhibit No. 7 [Obligation of Gem
Con. Mining Co. and Tenabo Con. M. Co.].**

In consideration of one dollar, and having issued our joint and several note in the sum of Five Thousand (\$5000) Dollars unto the First National Bank of Hornell, N. Y., or its agents, the right at any time upon default in the payment of the said note to enter upon any and all of the property of the undersigned and to extract therefrom ores sufficient to fully discharge all indebtedness, and we hereby bind ourselves and assigns to fully discharge this obligation.

GEM CONSOLIDATED MINING CO.

HIRAM TYREE,

Pres't.

TENABO CONSOLIDATED MINES CO.

P. B. LOCKER,

Pres't.

July 17, 1908.

Filed May 27, 1911, at 3:05 P. M. Recorded at request of C. Adsit 5/29/11 at 3:35 P. M. Bert Acree, County Recorder. File No. 2004.

State of Nevada,
County of Lander,—ss.

I, Bert Acree, County Recorder in and for the said County and State, do hereby certify that the foregoing is a full and correct copy of an instrument given to the First National Bank of Hornell, N. Y., permission to enter upon the property of the Gem Consolidated Mining Co., and the Tenabo Consolidated Mines Co., for the purpose of extracting ore, etc., as the same appears of record on page 712 of Book 4 of Miscellaneous Records of Lander County, State of Nevada, in my office as said Recorder.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 9th day of June, 1911.

[Seal]

BERT ACREE,

County Recorder in and for the County of Lander,
State of Nevada.

[Indorsed]: No. 1183. U. S. District Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. Obligation of Gem Con. M. Co., and Tenabo Con. M. Co. Complainant's Exhibit No. 7. Filed September 6, 1912. T. J. Edwards, Clerk.

Complainant's Exhibit No. 9 [Report and Statement of Tenabo Mining & Smelting Co. to Attorney General of Nevada, etc.].

Report and Statement of the Tenabo Mining & Smelting Company, 105-106 Mercantile Block, Salt Lake City.

May 31, 1911.

To the Attorney General of Nevada and to the County Recorder of Lander County, State of Nevada.

Pursuant to law, the Tenabo Mining & Smelting Company hereby makes and files its statement containing the following facts and information: This company owns the following claims, namely: The Little Gem and the Widow's Lode, which are patented, the Ollie, Reno, Winnemucca, Widow's Extension, Copper Hill No. 1. Copper Hill No. 2, Copper Hill No. 3, Copper Hill No. 4, and the Reliance Nos. 1, 2, 3 and 4, unpatented claims.

These claims, with the exception of the Copper Hill group, are located in the Bullion Mining District, Lander County, Nevada, the nearest postoffice being Tenabo, Nevada, about one and one-half miles distant; the [140] Copper Hills Group is located across the valley fourteen miles to the east and in the Cortez district, the nearest postoffice being at Cortez, Nevada.

The company holds undisputed title to the above claim under the patent and location laws of the United States under quitclaim deeds, dated January, 1909, and duly recorded in the office of the County Recorder in which the claims are located. There is a \$1,500 mortgage on the property.

The surface improvements and machinery consist of a 15 H. P. gasoline hoisting engine, a 20 H. P. gasoline engine to drive belt-driven air compressor, capacity 200 cubic feet of air per minute, gal-lows frame, whim, carpenter and blacksmith shops, boarding-house and bunk-house sufficient to accommodate twenty-five men. Total value about \$10,000. This equipment is located on the patented property.

Total feet of development in the Gem mine con-

sists of 400 feet of incline shaft 715 feet of drifting, blocking out 28,880 tons of ore of a value of \$479,907.90, according to the report of Mr. Duncan McVichie.

On Widow's group are a series of shafts and small workings varying from a few feet to over 100 feet in depth, showing five parallel ledges.

The Copper Hill group has 120 feet of tunneling and 14 feet of cross-cutting, not sufficient to show the limits of the ore bodies. All work except first 20 feet of tunnel is in ore. Surface conditions indicate the ore bodies to be 300 feet in width.

The character of the development work done since last report, according to the statement of the superintendent, is as follows: Extending tunnel on Copper Hill No. 3, 45 feet; cur and tunnel on Ollie claim, 35 feet; on the Reno, cut 20 feet, shaft 12 feet; on the Winnemucca cuts and tunnels, 40 feet; on the Widow's Extension, shaft, 15 feet; on the Reliance, Nos. 1, 2, 3, cuts and tunnels 70 feet.

The authorized capital stock is 1,500,000 shares, par value \$2 each of which 750,000 shares were originally placed in the *treasure*. Shares remaining unsold, 582,750. No treasury stock has been sold during the last six months and no ore or bullion has been shipped.

Receipts and Disbursements:

Balance in Utah National Bank, November 30, 1910	\$	56.68
Bills payable		1,500.00
Cash Deposit		1.25
		<hr/>
Total	\$	1,557.93

Disbursements:

Assessment work	\$1,100.00
Location work	28.00
Accounts payable.....	50.00
Sec. Sal. (4 month's office ex.)	200.00
Legal	20.00
Telegrams	18.46
Printing and postage.....	33.25
General expense	10.30
Balance in Bank.....	97.92

\$ 1,557.93

Very respectfully,

(Signed) TENABO MINING & SMELTING COMPANY,

W. MONT. FERRY, President.

JOHN JANNEY, Secretary.

State of Utah,

County of Salt Lake,—ss.

This day personally appeared before me, Benner X. Smith, a Notary Public, in and for the State and County aforesaid, W. Mont. Ferry and John Janney, who being first duly sworn, stated upon oath that they are respectively the President and Secretary of the Tenabo Mining & Smelting Company, a Nevada corporation; that they have read the foregoing statements; that they know the contents thereof and that the same are true and correct to the best of their knowledge and belief.

(Signed) W. MONT. FERRY,

JOHN JANNEY.

Subscribed and sworn to before me this 30th day of June, A. D. 1911.

[Seal] (Signed) BENNER X. SMITH,
Notary Public. [141]

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. Defts'. Report to Atty. General. May 31, 1911. Complainant's Exhibit No. 9. Filed September 6, 1912. T. J. Edwards, Clerk.

Complainant's Exhibit No. 10 [By-laws of Tenabo Mining & Smelting Co.].

BY-LAWS.

I. Corporate seal.—The seal of this corporation shall be as follows: It shall contain the name of the corporation and the statement that it was incorporated on December 31st, 1908.

II. Stockholders' Meetings.—The annual, and all special meetings of the stockholders, until otherwise provided, by resolution of the Board of Directors, shall be held at the principal office of the company at Salt Lake City, County of Salt Lake, State of Utah, and the annual meetings of said stockholders shall be held on the second Monday in February of each year at two o'clock in the afternoon of said day, and the notice of the holding of any meeting of the stockholders either annual or special shall be given by the president or secretary to each of the stockholders of this company of record, at least twenty days next prior to the date of the holding of such meeting, by the mailing to each of said stockholders a written

notice of the time and place of the holding of such meeting, and in general terms the business to be transacted thereat, addressed to the last known address of each of said stockholders respectively.

The annual and special meetings of the stockholders may be held at such place or places either within or without the State of Nevada as may be determined upon by the Board of Directors, and at all meetings of said stockholders a majority of the stock issued and outstanding shall constitute a quorum to transact business, and a majority vote of all stock represented at any such meeting shall be decisive of all questions voted upon.

III. Directors.—The Directors of this corporation shall be elected at the annual stockholders meetings, by ballot, but in event of the failure to hold such annual stockholders' meetings, then said Directors may be elected at a special meeting of the stockholders called for that purpose. The term of office of Directors elected at an annual stockholders' meeting shall be for a period of one year, and until their successors are duly elected and qualified; but the term of office of any director elected at a special meeting of the stockholders shall be for the unexpired term of the official year and until their respective successors are elected and qualified. The directors elected at the first meeting of the incorporators shall hold office for two years from date thereof and until their successors are chosen and qualified. To be qualified to hold the office of Directors a party must be the owner of at least one hundred shares of the capital stock of this company as shown by the books thereof.

IV. Directors Meetings.—Meetings of the Board of Directors may be called by the President or Secretary, or any two directors, upon the mailing to each of the directors at their last known place of address, at least two days before the holding thereof, a written notice of the time and place of holding such meeting, together with a statement in general terms of the business to be transacted at said meeting, and any meeting of the Board of Directors may be held in the city of Salt Lake, County of Salt Lake and State of Utah, or at any other place either within or without the State of Nevada that may be determined upon by the Board of Directors.

V. Officers.—The officers of this corporation shall be a president, a vice-president, a secretary, a treasurer and a general manager, who shall be elected annually and in all cases hold their respective offices until their successors are chosen and qualified.

VI. Qualification of Officers.—The officers of this corporation shall be elected by and from the Board of Directors, except the general manager and secretary, neither of whom need be directors of said corporation nor stockholders therein.

VII. Duties of President.—The president, and in his absence, the vice-president, shall preside at all meetings of the company and of the Board of Directors, and perform with such other duties as may be assigned to him by the Board of Directors.

VIII. Duties of Vice-President.—The vice-president in the absence of [142] the president, perform all duties of the president. He shall perform such other duties as may be from time to time pre-

scribed by the Board of Directors.

IX. Duties of Secretary.—The secretary shall have charge of the seal; he shall keep the records and books of account of the Company, and perform such other duties as may be assigned to him by the Board of Directors.

X. Duties of Treasurer.—The treasurer shall have charge of the funds of the company, subject to the Board of Directors, and shall give bond in such sum and with such surety as the Directors shall prescribe.

XI. Duties of General Manager.—There shall be a general manager who shall be elected by the Board of Directors, and who shall have general supervision of the business affairs of this company, subject to the Board of Directors.

XII. Authority to Certify Copies of Records.—The secretary shall have authority to certify the copies of by-laws, copies of resolution of the Board of Directors and copies of other papers and official documents constituting a part of the records of the company.

XIII. Authority to Execute Contract.—Unless otherwise provided by special resolution or power of attorney, all contracts, powers of attorney, deeds, agreements, applications, instruments in writing and all legal documents made and entered into by this company shall be executed by the President and the Secretary, who are authorized to affix the corporate seal of this company thereto. In the absence of the president, the vice-president may execute said instrument in his stead, and in the absence of the secretary,

the Treasurer may execute such instrument as acting secretary.

XIV. Quorum.—Three members of the Board of Directors shall constitute a quorum of the Board of Directors for the transaction of business.

XV. Authority of Vice-President and Acting Secretary.—In the absence of the president, the vice-president may in all respects perform and carry out the authority of the president, and in the absence of the secretary, the treasurer or assistant secretary shall act as secretary.

I, John Janney, Secretary of the Tenabo Mining and Smelting Company, hereby certify that the foregoing is a true and exact copy of all of the by-laws of the said company and that the same are regularly entered of record in the minute-books of the said company.

In testimony whereof, I hereunto affix my signature and the corporate seal of the said Tenabo Mining and Smelting Company, this — day of March, 1910.

_____,
Secretary.

United States of America,
State of Utah, County of Salt Lake,—ss.

This day personally appeared before me, _____, a Notary Public in and for the State and County aforesaid, John Janney, who, being first duly sworn, did dispose and say that he is the Secretary of the Tenabo Mining & Smelting Company and as such is duly authorized to certify to copies of the records of the said company and that the foregoing is a true and

correct copy of all of the by-laws of the said company and that the same are regularly entered of record in the minute-books of the said company.

Subscribed and sworn to before me this — day of ———, 1910.

_____,
Notary Public.

My commission expires ———.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. By-laws. Compl't's. Exhibit No. 10. Filed September 7, 1912. T. J. Edwards, Clerk.

Complainant's Exhibit No. 11 [Letter, Dated May, 1911, P. Pon Banque Chareire & Cie to John Janney].

BANQUE CHAREIRE & CIE,
Societe en Commandite.

Au Capital De 1,000,000 De Francs.

Agency De Paris,
7, Rue Drouot.

Address Telegraphique,
Charebank-Bourse-Paris.

Telephone (313.28
(326.66 [143])

Paris, May, 1911.

Mr. John Janney:

We have the honor to convey to you under this cover a notice relative to the emission in France of 45,000 certificates of \$20 each of the Tenabo Mining and Smelting Company at the price of 103 francs and 60 centimes. We pray you to read attentively

this notice, which will give you an idea of the brilliant results obtained up to date by the metallurgical enterprises or methods in mining of the same region.

From the advice of the most competent engineers, the Tenabo Mining and Smelting Company constitutes an enterprise similar to and of the first order. Its richness in gold, silver and copper actually visible, represents already a value of 20,000,000 of francs, or thereabouts. They estimate at more than 32 per cent the annual dividends from the start.

Payment will be demanded by the Society (that is, cash shall accompany the order). We therefore believe, that we can recommend the immediate purchase of the shares at par, at 103 francs and 60 centimes, by certificate of \$20 each, for it is to be presumed that an immediate raise will take place at the time, or immediately upon, their introduction in the market.

The Franco-American Bank, 22 Place Vendome, at Paris, is charged with the service of the coupons in these transactions, and is equally agent responsible to the Society, opposite the Administration of Registration and seal.

We send with this document a bulletin of purchase, which please return with the mention of the number of shares which you desire to have reserved, and which we will discount for the account of the Society, with the conditions as above until after the transaction is completed.

Please, my dear sir, accept our distinguished salutations.

P. PON BANQUE CHAREIRE & CIE.

P. FRICART.

TO MAKE MONEY.

Many Fortunes—the best known in the entire world—have been made in mining affairs by purchases at the opportune moment or time. Before you interest yourself in a mine learn well and inform yourself regarding the personalities who direct the mine. If this double examination does not give you absolute conviction: 1st, that the mining question possesses in *reality* all of the desirable qualities in order to be assured of a remunerative future; 2nd, that it is administered by competent persons and of perfect honor, giving you all the possible guarantees in point of view of the security of the operation that you are about to enter into—**ABSTAIN YOURSELF.**

But if, on the contrary, the information which has been given to you upon an affair of mining is of a nature that will satisfy you entirely upon the subject, so that it will be administered to your profit, then **DO NOT HESITATE TO TAKE AN IMMEDIATE PARTICIPATION** in the affair which is proposed to you, for it is the moment when you are solicited regarding the same that you have the more chances to make a very **PROFITABLE OPERATION. IT WILL BE TOO LATE WHEN EVERYBODY WILL KNOW THAT THERE IS MONEY TO BE MADE ON THIS SIDE**, and the shares which you hesitate to buy at the moment of their *apparation* will have run the most interesting period of enhancing in value.

This follows very rapidly the law of offer and demand, and if you wait until the results foreseen be-

gin to be realized, you will lose the greatest chance to become a beneficiary, and it will cost you a great deal more, because the value of the shares will enhance.

THIS IS AN OCCASION to make good the recommendations given above. READ ATTENTIVELY the notice CONCERNING THE TENABO MINING AND SMELTING COMPANY, and you will be convinced of finding unity in the entire affair—all of the proper elements to assure you an ENORMOUS GAIN, SURE AND RAPID. IT WILL BE one of the most brilliant transactions of the century. You cannot have any doubt regarding that. Because the properties of this Society are situated in the most mineralized part of the State of Nevada. The LANDER COUNTY which occupies a third place in the total production of gold and silver in the UNITED STATES. Three of the mines in the immediate vicinity of TENABO have already produced more than ONE HUNDRED DOLLIONS OF FRANCS. [144].

Because this company possesses four mines already recognized and developed, and the diversity of the metals extracted from the mineral which is found in abundance (or silver and copper) assure them of permanency, and of a long and profitable exploitation.

The mineral in sight actually represents a value of 19,026,382 francs, which corresponds already to 20 francs per share (that is to say, 200 francs per certificate).

Because the bank in which you have confidence

has studied this affair, and the calculations it has made will prove without doubt what a BRILLIANT FUTURE is reserved for this affair. The construction of a FOUNDRY will permit not only the economical treatment of the mineral upon the place where it is located, but more, to his great profit. The exploitation of mines in the vicinity will augment considerably the future payment of dividends. The importance of TENABO is based upon ores already known to be, not only by the mining enterprises which will bring mineral to the foundry, but also two powerful Railroad Companies: The Western Pacific Railroad and the Southern Pacific Railroad, which have decided of themselves as to freight charges. From the viewpoint of a financier, the unity of interest of the beneficiaries would be perfect between all of the shareholders. There are no privileged actions, nor obligations.

Because the administrators of the Society are personally large shareholders, and their situation does not permit them to associate their names with an enterprise upon any feature of which they would have the least doubt.

Because some of the most powerful banks in Western America gave them their support, and the emission of shares issued to the French shareholders is in the hands of a rich and powerful syndicate, which without doubt will give it greatest care.

Now DO NOT WAIT until the effects are felt. THIS IS THE MOMENT for you to reassure yourselves of the veritable coup de fortune. You will regret later on of having let the occasion escape.

The subscription will be without doubt several times covered. MAKE HASTE therefore, and take a chance, small or great according to your means, to profit at the prices now offered; and to assure yourself, address your orders IMMEDIATELY to your bank, or it will not be able to attend to all demands, and will be unable to serve you as you would like.

TRY TO BE AMONG THE FIRST.

BANQUE CHAREIRE & CO.

7 Rue Drouot, Paris.

Please buy on my account certificates of Twenty Dollars of the Tenabo Mining and Smelting Company at par, at the price of one hundred and three francs and sixty centimes (103 fr. 60 centimes), payable in cash. I remit you enclosed a sum representing the amount of this order. Please remit to me the titles against the reimbursement.

Signature: _____.

Name _____

Address _____

- (1) Number of certificates demanded.
- (2) Mode of payment not chosen.
- (3) In case of change of address please indicate in returning this bulletin.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. French Documents. Complainant's Exhibit No. 11. Filed September 7, 1912. T. J. Edwards, Clerk. [145]

**Complainant's Exhibit No. 12 [List of Certificate
Stubs of Tenabo Mining & Smelting Co.].**

List of Certificates Stubs that are Blank.

Book "A." 110 to 129, inclusive.

131 to 152, "

154 to 156, "

158 to 168, "

170 to 204, "

206 to 208, "

Book "D." 1039 to 1200, inclusive.

Book "E." 1457 to 1460, "

1462 to 1500, "

Book "F." 1502 to 1750, "

Book "G." 1957 to 1960, "

Book "H." 2002 to 2021, "

2023 to 2032, "

2034 to 2036, "

2043 to 2141, "

2143 to 2193, "

2197 to 2198, "

2200 to 2241, "

Book "I." 2252 to 2450, "

2452 to 2500, "

Book "J." 2502 to 2594, "

2596 to 2674, "

2676 to 2679, "

2682 to 2691, "

2693 to 2694, "

2696 to 2699, "

Book "L." 3213 to 3220, "

3222 to 3250, "

240 *Tenabo Mining and Smelting Company*

Book "M." 3252 to 3410, " "
3436 to 3494, " "
3496 to 3500, " "
Book "P." 4096 to 4147, " "
4149 to 4171, " "
4173 to 4196, " "
4197 to 4221, " "
4232 to 4250, " "
Book "Q." 4252 to 4320, " "

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. List Certificate Stubs Complainant's Exhibit No. 12. Filed Sept. 7, 1912. T. J. Edwards, Clerk. [146]

[Testimony of H. P. Clark, for Plaintiff.]

H. P. CLARK, witness for complainant, upon oath testified:

My name is H. P. Clark. I reside in Salt Lake City. I am in the banking business, and have been 18 or 20 years. I have lived in Salt Lake eight years and seven months. I am a stockholder in the Tenabo Mining & Smelting Co. I own 100 shares, I believe. I never received the stock, however. I became stockholder at the time they incorporated. I never invested any money in it but was on the board of directors. I was president until February, 1910. I have never seen the properties of defendant. Mr. Janney requested me to go on the board. I terminated my relations with the company on my own account. I was not satisfied with some things. I did not like Hiram Tyree and did not want to have anything to do with him. He was trying to get in

(Testimony of H. P. Clark.)

and run the company. I was confident of Janney and Locker.

Cross-examination by Mr. EDWARDS.

I always acted in the company's interests. I never transferred any shares of stock because I never had any.

(Witness excused.)

[Testimony of Benner X. Smith, for Plaintiff.]

BENNER X. SMITH, witness for complainant, testified:

(Produces contract marked Ex. 7.) That contract was received by me right after I qualified and at the time negotiations were taken up with Mr. Locker for the sale of stock. Mr. Janney sent it to me together with the Coudert letter and form of trust agreement heretofore offered in evidence. (Exhibit 7 copied in words and figures:)

Printed
Republique
2/mes
10
Ensus
1F 50 c.
Francaise

(Impression seal)

Enregistrement

Timbre et Domaines.

Between the undersigned:

“The Tenabo Mining & Smelting Company” registered with a capital of Three Million Dollars, the head office of which is at Salt Lake City (represented herewith by Mr. Payton B. Locker, fiscal agent of the said company, acting under powers vested in him by the extraordinary General Meeting of the company held on the 14th January, 1909) hereafter called the Vendors, of the one part, and Messrs. J. A. C. Courtot & Co., Bankers, 51 Rue le Peletier,

Paris, of the other part, It has been arranged and agreed as follows:

“The Tenabo Mining & Smelting Company” being desirous of placing 450,000 shares of its capital stock in Europe, of a nominal value of two dollars each, and the J. A. C. Courtot & Co.’s bank, after having examined the papers of the said company, and the reports of the engineers, agree to lend their support, and the following arrangements have been made between [147] the parties:

Article 1. (a) The Vendor agrees to apply through Messrs. J. A. C. Courtot’s bank to the Minister of Finances and to the Administration for the Registration of Property and Stamp in Paris for the compound duty on the shares and to furnish all necessary documents required by the laws of the French Republic (and to furnish the amount of caution money for the said shares or part thereof).

(b) They further agree to supply all documents necessary for the publication prescribed by the laws of the official Journal of the French Republic.

(c) They furthermore agree to abide by the formalities required for obtaining the admission of the shares upon the French market.

Messrs. J. A. C. Courtot’s bank, on the other hand, bind themselves to give all their assistance in respect to these various formalities so that they may be accomplished in the shortest possible time.

Article 2. The cost in respect to application for compound duty on the shares and for deposit in respect of annual taxes to the Administration of the

Registration of Property and Stamp as also the compound duty or *comptant* stamping, and further the costs of publication in the official Journal for obtaining the free circulation of the said shares in France, together with the expenses attached to the quotation of the shares and cost of printing the same to Bearer, as also all cost of advertising in the daily press of Paris and the Providences, or in other financial papers, and generally the cost of issuing, are altogether reckoned to amount to a minimum sum of 45,000 dollars. (This amount shall be supplied by the Vendor.)

(Written in longhand:) x 14 words ruled out and replaced by the following phrase: in three payments of one-third of \$45,000, for each of the three options mentioned in art. 3 hereafter) and in the event of expenses exceeding that amount, then J. A. C. Courtot's bank shall bear all sums in excess of that amount.)

Article 3. The Vendor hereby give option for three months to Messrs. J. A. C. Courtot's bank at a price of Frs. 6.25 per share of nominal value of two dollars each, for 150,000 shares dating from the signature of these presents, after all necessary documents have been handed over to commence placing. J. A. C. Courtot's bank takes firm one-half of the said 150,000 shares, being therefore 75,000 shares, which they bind themselves to pay for within three months from the date of the above mentioned documents being handed over to them by the Vendor.

The Vendor bind themselves to pay to J. A. C. Courtot's bank the *pro rata* proportion of the said

\$45,000 mentioned in Article 2 above, being therefore the sum of \$15,000, upon the documents being handed over to J. A. C. Courtot's bank at first request.

In the event of J. A. C. Courtot's bank having, at the expiry of three months placed and paid for the whole of the 150,000 shares, then the bank shall have the right to a further block of 150,000 shares under the same terms and firm taking, as above mentioned, except that the time option shall be six months instead of three months, by reason of the summer season. And if at the end of the said six months J. A. C. Courtot's bank have placed the second block of 150,000 shares, then the bank shall have the right to placing under the same terms, conditions and firm taking, as aforementioned, of a third block of 150,000 shares, being the remainder of the 450,000 shares hereinbefore mentioned.

Article 4. The shares shall be delivered by a trustee and shall represent nominative certificates deposited by the company in the hands of the said trustee. The shares so delivered shall be to bearer under the seal of the company with coupons attached and conjointly signed by the directors of the company and the trustee; the said 150,000 shares to be first delivered shall be in the following denominations:

20,000 certificates to Bearer of five shares each.

5,000 certificates to Bearer of ten shares each, and this shall also apply to further blocks of shares so far as same has not been altered. If required by

mutual consent of the parties. A specimen of the shares shall be supplied by J. A. C. Courtot's bank.
[148]

Article 5. J. A. C. Courtot's bank bind themselves to obtain as soon as possible a quotation of the said shares on the French Bank market. Nevertheless the sale of the shares by J. A. C. Courtot's bank may commence before the necessary formalities in respect of said quotation have been fulfilled.

Article 6. The Vendors, on the other side, bind themselves to have the shares quoted on the New York Stock Exchange, but so that the prices under such quotations in New York shall not be less than those in Paris.

Article 7. The trust certificates to Bearer shall be lodged by the Vendors in a Parisian Bank, which shall hold the same at the disposal of J. A. C. Courtot's bank against payment.

Article 8. The Vendors guarantee not to issue certificates to Bearer for a larger quantity *that* that of 450,000 shares above mentioned, but as the Vendors shall still hold a further 300,000 capital shares for disposal, they give by these presents to J. A. C. Courtot's bank a preference right thereto if they decide at any time to place the same, being the said 300,000 shares, or part thereof, in Europe.

Article 9. The Vendors bind themselves to have an office of the company in J. A. C. Courtot's bank establishment for giving information and shall pay an annual rent of frs. 5,000 on condition that J. A. C. Courtot's bank shall hold the said office properly

(Testimony of Benner X. Smith.)

furnished, heated, lighted and shall nominate one English speaking clerk to attend especially to the business of the Tenabo Mining & Smelting Company.

Article 10. It is hereby agreed that the dividend coupons shall be payable in Paris without any deduction for commission or discount except legal taxes, and J. A. C. Courtot's bank is hereby appointed as financial agent for the payment of the said dividends, and shall be allowed a commission of frs. 5 per frs. 1,000 paid in coupons to the company.

If, however, J. A. C. Courtot's bank deem it necessary to transfer the payment of the coupons to another bank, then they shall give the latter the said frs. 5 in respect of each frs. 1,000 paid in dividends.

All disputes arising under these presents shall be referred to the Tribune of Commerce of La Seine, which is hereby declared to be alone competent to deal with same.

Made in duplicate in French and English in Paris, this 15th day of December, 1909.

La et approuve

Joll * * *

Cross-examination by Mr. EDWARDS.

We took it up for consideration, and discussed the advisability of entering into it, and finally drew up another which eliminated the bad features. The expenses—registration fees, advertising expenses, an office rental, etc. I did not like the submission to the courts of France a little bit. But I did not see how the stock could be sold in this country. I made no special investigation, however. I was told that

(Testimony of Benner X. Smith.)

the curb quotations in New York were founded on wash sales and did not represent anything. The price of the curb quotations was \$2.00 a share. I think. They were carried on by Tyree. I saw a clipping in a New York paper to that effect. [149]

Redirect Examination by Mr. SHANK.

None of the company's stock was sold on the curb. I heard that about \$12,000 worth of stock had been sold on the curb. I do not know to whom. In the Locker contract, Mr. Locker was authorized to sell stock so as to net the company fifty cents a share. I don't know how much he was going to sell it for on the market. I thought fifty cents to the company was ample, and that if he could get 150 per cent, he could have it as he was to a big expense over in Paris.

[Testimony of W. Mont Ferry, for Plaintiff.]

W. MONT FERRY, witness for complainant, testified:

Direct Examination.

I have not found the certificates of stock issued to me.

[Testimony of Rodney T. Badger, for Plaintiff.]

RODNEY T. BADGER, witness for complainant, testified:

My name is Rodney T. Badger. I reside in Salt Lake City. I am cashier of the Utah National Bank, and have been for four years. I have lived in this city thirty-nine years. Prior to becoming cashier, I was assistant cashier of McCornick & Co., bankers. I was with them eighteen years. I was stockholder

(Testimony of Rodney T. Badger.)

in the Tenabo Mining & Smelting Co., until about a year and a half ago. I was an incorporator and was on the board of directors, and secretary and treasurer. Mr. Tyree requested me to be on the board. One of his companies went into this company—the Gem property. I think the company transferred a certain number of shares to the Gem Mining Company, but I don't remember how many. I never had financial dealings with the company. The account with us was closed May 22, 1911. I delivered all books and papers of the company to Mr. Janney when I went out of office. Also all checks. I have the original ledger sheet as run on the books of the bank. (Produces ledger sheet, marked Exhibit 8.) That is absolutely true. I think the first deposit of \$1,425 was perhaps derived from the sale of stock by Mr. Locker. The deposit of \$24,551.40 was, I think, a wire credit from some New York Bank.

I resigned because we had several words, scraps concerning Mr. Tyree and Mr. Locker, and I didn't want to stay longer. I closed my association because I did not want to do lots of things they wanted us to do—Locker and [150] Tyree, also Janney, who seemed to side in with Locker. I don't know how much stock was delivered for the \$24,551.40. I did not know Tyree got a ten thousand dollars out of that sale. I did not know Tyree kept about 65,000 shares of stock which the company delivered up. I did not know Tyree executed the company's note for any amount or that he hypothecated some stock as security for other notes. The stock was in the hands of

(Testimony of Rodney T. Badger.)

the Trust Co. in New York, and they would have reported it to the company here. I knew the Reliance Co., owed McCornick & Co., when I left them—February, 1908. I don't know how much. I remember there was a payment on that note and mortgage. Don't remember when.

Cross-examination by Mr. EDWARDS.

I remember that the corporation took over the title to certain mining claims belonging to the Gem Consolidated Mining & Milling Co., in payment of its capital stock. The stock was given to me—one hundred shares—for being a director. I have never received a certificate nor assigned the stock to anyone. The New York office never issued the stock. I kept up all accounts so that they could be worked up in a short time. All assets, expenditures, etc., were kept separately.

The board were always in harmony. It was Tyree and Locker that made the scraps. Tyree never came to meetings after the time we had the scrap. The board stated to Mr. Janney that it would not make any more contracts with Locker in the future. Of course, I looked up the proposition and read all the matter on it to be sure that it was a good proposition before going into it. I did as I thought to the best interests of the company at all times.

Redirect Examination.

Yes, I received fifty dollars a month. I turned over all letters and stubs, etc., of the company's to my successor. I was not in favor of the French contract at all.

(Testimony of Rodney T. Badger.)

Cross-examination.

The board discussed carefully every feature of the French contract; the most *objectional* feature was that this corporation should place stock on the French market and pay office rent and certain liabilities for expenses. [151] Submission to French government was also objectionable. It was urged because it would be easier to get the money in France. We did not sign it.

(By stipulation of both parties, testimony postponed to further date agreeable to both parties.)

(Continued July 6, 1912, 10 A. M.)

(Pursuant to agreement between parties, following testimony is introduced.)

[Testimony of Duncan MacVichie, for Plaintiff.]

DUNCAN MacVICHIE, witness for *defendant*, testified:

My name is Duncan MacVichie. I live in Salt Lake City. I am fifty-two years of age. I am a mining engineer. I have been such twenty-five years or more. I was with the Standard Oil people in Wisconsin and Minnesota from 1889 to 1897, and then in charge of the Mercur from 1897 to 1900, and then with the Bingham Consolidated Mining & Smelting Company for, I think, eight years. I was general superintendent in all of these. I have examined the Little Gem property in Tenabo, Lander County, Nevada. I did so in December, 1908. I was making a report for the board of directors. The ones I examined were: The Little Gem, four lode claims, a total of seventy acres; the Nevada-Phoenix, three lode

(Testimony of Duncan MacVichie.)

claims, fifty-two acres; and the Two Widows group, one and a fraction, twenty-one acres, a total of one hundred and forty-two acres. These claims all joined each other. The claims of the Gem Group joined each other; the Ollie, Winnemucca and Reno. The Phoenix group contained the Gold Note No. 2, Phoenix and Standard. The Two Widows was a full claim. The workings of the mines are as follows: It is developed by an incline shaft to a depth on the plane of the vein of about 375 feet; and by six levels consisting of the 60, 90, 100, 200, 300 and bottom levels. There are upraises and two stopes, a small stope on the 200 foot level. I want to add here that I was unable to reach the bottom of the incline, due to water. It was about twenty feet deep. So that I am unable to say just what the bottom of the incline is like, but the workings are pretty thorough above the water level, which block out the ore very thoroughly. There is no ore in the 60, 90 and 100 foot levels. The east drift on the 200 foot level is approximately three hundred feet in length. This drift bears to the north quite rapidly as it extends from the incline. The 200 [152] foot level west is approximately forty-five feet in length. The 300 foot level east, or easterly, would be approximately one hundred feet in length. There is an incline driven in a westerly direction from just below the 300 foot level, to ninety feet in length. It is driven at about right angles to the strike of the vein. All of the levels show a well-defined vein and the 200 and 300 foot levels including the incline from the 200 foot level down, and the dif-

(Testimony of Duncan MacVichie.)

ferent raises, show a well-defined vein of merchantable sulphide copper ore. I estimated 7,783 tons straight smelting ore and 17,257 tons of concentrating ore was blocked out and ascertained by me. The smelting ore contained .125 ounces of gold; 17.46 ounces of silver; 5.92 per cent copper. I did not get the iron contents.

Figuring copper at 12 cents and silver at 56 cents per ounce would give a net value of \$13.38. The present value is approximately \$21.13. The gross value of a ton of matte is \$175.20. Seven tons of ore goes into it. There would be \$92.65 profit per ton of matte. That represents seven tons of ore. It is absolutely necessary to put on a concentrating mill in order to make a success of the property. (Conclusions read.) The proposition of this company present possibilities a little beyond the average. The Little Gem will not take a large amount of money to demonstrate its value. The Nevada-Phoenix, with its high-grade ore, makes possible the mining of narrow veins profitable. The Two Widows has ore of good commercial value. I do not consider the situation as favorable. I think it a very good geological venture. I consider that at the time I examined these properties, that twice the amount of ore in sight was capable of being obtained.

Cross-examination by Mr. SKEEN.

I do not do my own assaying. The Union Assay Office does all of it for me. They can verify the assays if you wish. It cost about \$4.00 per ton to mine the ore in 1908.

(Testimony of Duncan MacVichie.)

Redirect Examination by Mr. EDWARDS.

The prospective values on the Gem and the Phoenix are very attractive. Above the ordinary. On the Two Widows there was no ore developed there. The conditions are not particularly favorable to the Two Widows. In the Nevada-Phoenix there is considerable ore exposed. It has considerable value. [153] The ore is good quality. I think I would give ten thousand dollars for it.

To the 7,783 tons of straight smelting ore, this gives a net value of \$111,530.39, on the 17,257 tons of concentrating ore, it gives a net value of \$75,240.-52, making a total net value of \$186,771.91. The cost of erecting reduction works is:

Concentrating mill	\$25,000.00
Matting plant	30,000.00

Total.....\$55,000.00

leaving an estimated profit on the present available ore of \$131,770.91. This is the most reliable plan of estimating in the United States. Suggested by the "Engineering and Mining Journal" of New York City.

(Adjournment to next day.)

(Continued September 2, 1912.) (On absence of John Janney, postponed.)

Subpoena for John Janney introduced, proof of service by Wm. J. Cowan (Adjournment of meeting.)

Continuance, September 3, 1912, 2 P. M.

[Testimony of John Janney, for Plaintiff.]

JOHN JANNEY, witness for complainant, testified:

I am John Janney, secretary of the Tenabo Mining & Smelting Co. I have the record of said Co., consisting of book for transfer of stock kept by New York Trust Co., register for certificates showing stock registered by it; book showing vouchers for items of expenditures and cancelled checks. I told Miss Robertson to look up the cash-book, but I could not find it. I also have the letter files of letters received and sent. I have expressed the stock certificate books to Carson City. I will have those books at the trial at Carson City. I also have the minute-book.

(Witness dismissed and *order* to bring books of company to Carson City trial.) (Adjournment to September 4, 1912.)

Notice by attorneys for plaintiff that the testimony of plaintiff would be held on February 23, 1912, by way of deposition and evidence in trial. Same accepted by attorney for defendant.

Complainant rests. [154]

Defendant's Testimony.

Testimony of Charles D. Bates, the complainant, before John W. Christy, Standing Examiner, at Salt Lake City, Utah, on the 4th of September, 1912.

The complainant was represented by W. H. Wilkins, and the defendant by H. C. Edwards, their respective solicitors and counselors.

[Testimony of Charles D. Bates, for Defendant.]

CHARLES D. BATES, the complainant, being called as a witness in behalf of the defendant, was first duly sworn and testified as follows:

Direct Examination by Mr. EDWARDS.

My name is Charles D. Bates. I am forty-eight years of age, and Assistant Secretary of the Inter-mountain Life Insurance Company. I reside at Salt Lake City, Utah. I am a stockholder of the defendant company. I have not, and never had, a certificate of stock. I am the complainant in this case. I purchased the stock of P. B. Locker, paid him for it. He did not deliver me a certificate. He showed me that he had made a transfer of the stock. He showed me the records of a Trust Company in New York, showing that I was a stockholder, and I gave him my proxy to vote. The record he showed me was supplied by a Trust Company in New York. I am not certain of the name; it had an oath attached. I cannot tell you what Trust Company it was. As near as I can remember it was two years ago last January or February. This record showed that I had two hundred shares of stock; the record was written on a piece of paper, a list of all the stockholders certified by this Trust Company. It was certified that this stock was held in trust, or in a pool, showing the transfers that had been made from a certain date up to another certain date. I have an attorney to represent me in this case, Mr. J. D. Skeen. I have not paid him any consideration or retainer. I have not agreed to pay him any compensation for the services

(Testimony of Charles D. Bates.)

which he renders in this suit. I cannot say that there is an understanding that I will not be held liable for any compensation to him. I have had no agreement with him; the matter has not been discussed with Mr. Skeen. It was discussed by me with another party, Mr. George S. Kimball. I cannot answer what was the substance of the agreement or understanding with him in reference to the payment of Mr. Skeen's attorney's fees without reference to other matters. I am a bookkeeper [155] and in matters of that kind I depend on records rather than my memory. I do not remember the substance of my conversation with Mr. Kimball in reference to who was to pay the attorney's fees of Mr. Skeen in this case. Mr. Kimball would pay the attorney's fees. He became responsible for it. Mr. Kimball discussed with me the facts that are set forth in the bill of complaint before the suit was brought. After the discussion with Mr. Kimball I went to the office of Mr. Locker and Mr. Janney, I suppose the office of the defendant company, and made some inquiries. I saw there Miss Robertson, the stenographer. I asked there and was shown some books, I cannot tell just what. I inspected the books in a cursory way. I looked for something but I have forgotten now just what it was. I looked for one thing, I cannot tell you what it was, I do not know, do not remember. At the time I filed the complaint there were some of the things that I did not know, and some of the things I think I knew. I could answer whether I had personal knowledge as to the facts stated in the

(Testimony of Charles D. Bates.)

complaint if I had a copy of the complaint. I can't tell which I knew, I want a copy of the complaint before I answer. The stock was originally purchased, that is it was accepted by me as payment for work. I want to explain that I had never been able to get anything as the result of my work and I could not sell the stock, and Mr. Kimball thought there was a chance for me to get the value of the stock out of it, that was by bringing suit. He did not state to me that by bringing the suit he thought he would be able to sell the stock the details were not discussed. I had the stock and was anxious to get my money out of it. It is in substance true that when Mr. Kimball represented to me, or stated, that if I brought this suit he thought I could get the money out of the stock, then I agreed to bring the suit, become the plaintiff and Mr. Kimball would pay the expenses of the suit and the attorney's fees. That is the substance of it. I won't say it is not true, but it is not the whole truth. I cannot, without referring to some memoranda and records, state to you the rest of the truth of the matter. I have not got those records with me, it might take two or three days to obtain them. They are in my old office and I have not been in the office for over a year. They have changed girls there and I know nothing about the files, [156] everything would have to be looked through. With reference to the other facts that I referred to, it is merely a matter of language. I would state it in this language: That if the Mining Company was brought into condition so that the mine could be

(Testimony of Charles D. Bates.)

worked the stock might be of value, where, under the conditions as they existed at that time, it did not appear to have any value. I got the idea that it had no value. I cannot answer any better than to say that I had no idea as to how this lawsuit was going to result in putting the mining property into the condition that I thought it ought to be. The result of the lawsuit I knew was to have a receiver appointed; no other result was supposed to be obtained. Mr. Kimball did not discuss with me as to what the result of the receivership would be, or as to why I wanted it. I read the complaint before I signed it. I cannot tell without seeing the complaint that it contained many things upon which I had no information whatever. I signed it in Mr. Skeen's office. I did not discuss with Mr. Skeen the fact that there were things in there that I knew nothing about. As to whether or not the books of the company were kept in such a way as to record the transactions of the company. I looked at the books I spoke of in a cursory way for certain information; I cannot call it an examination. I could not tell from that examination whether the transactions of the company were properly recorded or not. I would say that I depended upon the word of another man. I cannot tell you what other man; it is a matter of record; a man don't remember names. It was not Mr. Kimball. I cannot tell you who he was; I cannot tell you what he told me. I read the minutes of the meeting in which the giving of a contract by the defendant company to Mr. Locker was recorded. That

(Testimony of Charles D. Bates.)

is all I know about it. I could not tell by the looks of it whether it was in good faith or not; nobody told me whether it was made in good faith or not. They would not naturally make such a contract unless in good faith, and it was a supposition on my own part, when a thing of that kind exists, it was made in good faith. I have no knowledge to the contrary at this time and had no knowledge to the contrary at the time I signed the complaint. I do not know whether or not the defendant company is insolvent; I believe it to be insolvent; I do not know any facts from which I believe that the company is insolvent; I have no facts in my memory that I draw the belief, [157] or form the belief, that the company is insolvent, the facts are a matter of record. I have never made any investigation to see what the value of the defendant's property is; I have never been down there to see. I signed the complaint that was prepared under the supervision of Mr. Skeen and Mr. Kimball. I was not willing to sign any complaint. I was willing to sign that complaint. No, I did not sign the complaint without making any other or further investigation, and with no further knowledge with reference to the facts contained in it than those I have already related. I do not know, I cannot tell you from memory what other facts I had knowledge of at that time, and what other investigation was made; it is a matter of record. I have stated all the facts within my recollection other than those which are a matter of record. Mr. Kimball did not discuss with me the fact that he wanted a nonresident of Nevada

(Testimony of Charles D. Bates.)

to bring this suit. He told me, I knew the suit was to be brought in Nevada. I did not discuss with Mr. Kimball why he did not, as a stockholder, bring the suit. I do not think the matter was discussed with Mr. Kimball at all, that if a receiver was appointed there would be a sale of the property. I had the opinion that Messrs. Locker and Janney influenced the Board of Directors of the defendant company to execute the contract for the sale of stock in France. The fact that they did it was *prima facie* evidence that Locker and Janney influenced the Board to do it. This was simply from my acquaintance with Mr. Locker and knowing his disposition. When I stated that the contract was made in good faith I meant by good faith, that the contract was to be carried out, that was my understanding of the meaning of good faith. I can't think that any man, any business man, could make such a contract and think that he was doing for the best interests of the stockholders. That is the only reason in my memory for thinking that the contract was not made in good faith by the Board of Directors. That is the only thing I can think of now; further questions might bring out something else. When the suit was brought it was my idea that if the suit was successful it would prevent the carrying out of the Locker contract, and the sale of stock under it. It was my desire to prevent the sale of stock under that contract. It would be very hard for me to get away and go to Carson City to appear as a witness in this [158] case. I would prefer not to go. I am not willing to go. I will not

(Testimony of Charles D. Bates.)

be there at the trial of the case. My interest is not enough to pay my expenses. If my expenses were paid and the matter of my position with the company is taken care of I would go. I mean at the present time there is a good deal of work, a good deal of responsibility devolved upon me that can hardly be shifted at a moment's notice. I mean that I would have to get the consent of the company to absent myself for two or three days. I won't answer either way whether I think that can be done.

Cross-examination by Mr. WILKINS.

With reference to the facts relative to the defendant company, that we had of record in our office, we had done work for them, multigraph work and work of that kind, for them each year. The complaint was the result, much of it, of information that is of record in our office at the present time; there are several things, copies, that are matters of record. The work was done by others than myself. The work I had reference to was multigraph work. The matters I testified to this morning were simply from my recollection. I do not wish to be understood that the allegations in the complaint were based simply on what I have testified to. The records of the facts which we had are accessible if I had time to dig them up. The facts which were given to me were some of them given by other parties than Mr. Kimball; Mr. Kimball in common with others. They were to some extent the result of my own investigations. The stock that I had received was given to me in payment for the work that had been done for the defendant

(Testimony of Charles D. Bates.)

company, two hundred shares. The record of this stock being in my name was shown to me in Mr. Locker's office. I do not think he personally did so; I think it was his stenographer. That record was the record of a Trust Company in New York, I am not sure of the name. That record showed that there had been transferred to me two hundred shares of stock and Mr. Locker asked me to give him a proxy to vote these shares, which I did more than once. I have never realized anything out of this stock. My idea in bringing the suit was I understood the mining property was not being worked and was good property, and by bringing the suit it might be brought into shape so it could be worked. I have been unable to dispose of my stock, or get anything out of it. It was for the purpose of having the company, or the affairs of the company, [153] put in hands that would manage it properly and bring about a value to my stock that I brought this suit. The allegations of the complaint were based upon facts which were obtained in part by me and were given to me by others. I had confidence in Mr. Kimball as stating the truth. I would be willing to attend the trial providing my expenses were paid; if Mr. Edwards would arrange with the company, getting consent that I be absent two or three days to attend the trial. I know with the work there is on hand in the office I should not get away. I feel that if I went away without consent it would jeopardize my position. My interest in the defendant company in this suit is simply confined to the value of two hundred

(Testimony of Charles D. Bates.)

shares of stock, which would not justify me in going to the expense of going to Carson City and also the risk of losing my position. I consider that the evidence to be introduced in this case are largely matters of record. My interest in the suit can be maintained without my presence, any testimony that I could give would be taken from the record.

Redirect Examination by Mr. EDWARDS.

My memory is not very good as to the matters that I have testified to here. I brought this suit with the intention of preventing Mr. Locker from selling any stock under that Paris contract. As to whether or not that stock could be sold to net the company more in any other way than the way in which Mr. Locker was undertaking to sell it, I have no knowledge of anything that might happen in the future. Mr. Locker and I have always called ourselves friends, there was no antipathy between us. If I should say that I did not like Mr. Locker very well I would not be exactly telling the truth. There are lots of people you don't like or dislike, as to him my like or dislike was neutral. I cannot tell whether I discussed this matter with Mr. C. C. Wiley before the suit was brought. I may have. I do not remember of any correspondence with him. I do not know of any acts of mismanagement that have occurred with reference to the Tenabo Mining and Smelting Company. I believe there have been acts of mismanagement; I do not know so as to enumerate them; the complaint states them. I mean to say that I made a complaint and do not remember what was put in it, and signed

(Testimony of Charles D. Bates.)

it, and I believe it to be true. I do not care what complaints I had; I tried [160] to tell you that I do not remember. It was talked over with Mr. Skeen what was to be put in the complaint in my presence and with others. Mr. Kimball was not there every time. I have talked with Mr. Skeen when Mr. Kimball was not there. Mr. Kimball was the informant to me of some of the facts that are alleged in the complaint. I cannot tell you who of the others ever told me that the corporation was insolvent; I do not know that it is insolvent. I was told it was in a bad way; nobody ever told me it was insolvent. I believe it was, I was told that it was believed to be insolvent. I cannot tell you who told me that without reference to a book. I do not remember that anyone ever told me that there were many obligations that were due and owing that were not paid. I tried to dispose of my stock and could get nothing for it. I assumed it had no market value. As a stockholder of the company I would naturally suppose we would be responsible if we would let him sell something of no value to those poor people over in France. I think I stated that my motive was to try to get the mining property in shape so that it could be worked and made of some value, but I did not want Locker to sell that stock at the price he was permitted to sell it under the Paris contract. My stock had no value. I was interested in my own stock, not in anybody else's. If my stock were made valuable by working the mine, everybody's stock would be made valuable. I had no idea that the money that Locker might get

(Testimony of Charles D. Bates.)

would ever help work the mine. I was of the opinion that if Locker got any money it would not be used to work the property. I had no idea what it would be used for. It was one of my ideas that if Locker got money it would not be used in working the property. My idea was based on my general knowledge of Locker's character, the man for whom I had no like or dislike. I expected very little of it would ever reach the company. That was because I thought Locker was dishonest.

Cross-examination by Mr. WILKINS.

In stating that I do not know what was in the second complaint, I mean that I do not remember without refreshing my recollection. I do remember the sole object of the suit was not to prevent the sale of the stock under the Paris contract, but the object of the suit was other than that. That was one of the details. [161]

[Testimony of Alfred E. Raleigh, for Defendant.]

Mr. ALFRED E. RALEIGH, for the defendant, testified as follows:

My age is 42 years. I reside at Tenabo, Nevada, and have since 1905, am in mining business and have been for 35 years. I went to Tenabo when the camp was just struck, and have watched its development closely. Have been in the employ of the Tenabo Mining & Smelting Company and was before that. I was in the employ of the Tenabo Consolidated Mining Company. They owned the Gem claim. Before that, I was in the employ of the Reliance Milling &

(Testimony of Alfred E. Raleigh.)

Mining Company. That company also owned the claim prior to the time that the Tenabo Consolidated came in. I supervised the opening up of that claim. There is a fissure vein on the claim, and it appears upon the surface. It can be traced for 500 feet. The incline shaft that has been testified to by Mr. McVichie in his report is the shaft or incline from which the main workings have been done upon the ground. It is about 320 feet deep. The length of the longest shaft is about 400 feet. I have discovered an ore chute in this vein. It is about northwest with reference to the collar of the shaft. The ore chute that I have discovered is about 350 feet and runs from five feet at the surface to four feet at the bottom. I followed the vein down from its entire depth. The vein is fourteen feet wide there, with good walls. Between the collar of the shaft and the lowest level a drift has been run about fifty feet. There is another one at one hundred feet, running to the north about 20 feet. The next level, about 50 feet deeper than the shaft, there is a cross-cut, the drift running about 75 feet. At 300, there is a drift running about 350 feet to the northwest, and opposite that, there is a drift running to the south about 600 feet, and down at the 300, there is a drift running to the east, and there is where the forks the main shaft that they are running now—the ore chute—turns to the south; and there is a drift running off from that 60 feet; then this long part of the incline runs on through—that is the 400 foot incline. There is a raise in that incline and a good deal of stoping done in there.

(Testimony of Alfred E. Raleigh.)

Those workings generally penetrate the ore chute. The ore chute extends from the lowest level made in the mine to the surface. It is continuous all the way. There is nothing in the lower workings to indicate that [162] the vein will not continue into the depth. It all indicates that it will. About the 28th of March last I saw Mr. Kimball and Mr. Sizer going down into the Gold Quartz. I do not know what they did. I do not know that they examined the Gem. I told them I would not have anything to do with their examination unless there was instructions from the president.

Cross-examination.

The length of your chute is about 360 feet. I have seen it at all the distance. It is continuous that entire distance. In the last three years, we have not added in depth to the main shaft or incline nor to the main level or the shafts or levels in any part of the mine. I am sinking a shaft from the surface there now in order to get air. We have run a raise from just on top of the water 290 feet depth. The length of that raise is 90 feet. When I left the other day, the air shaft was down between 35 and 40 feet. We have done some assessment work on the surface. We have done some work on the other mine there in the last three years. I have done the work on all eleven claims. In the Copper Hill group there are four claims, and we have done \$400.00 worth of work on those claims each year in driving a tunnel. That tunnel, after the first fifteen feet, is all in copper ore. The development that has progressed has increased

(Testimony of H. C. Edwards.)

the favorable conditions of the geology of the property. We have taken out, but have not shipped any ore. I have taken out ore all the time.

At the Copper Hills, we did that as assessment work. The work in taking out the ore was simply the equivalent of \$100.00 on each claim. There are eleven claims. The Copper Hill group of claims is located about twelve miles from the Gem property.

[Testimony of H. C. Edwards, for Defendant.]

Mr. H. C. EDWARDS, on behalf of defendant, testified as follows:

Direct Examination by Mr. ASHTON.

My name is H. C. Edwards. I reside in Salt Lake City. I am acquainted with the circumstances connected with the consolidation of the Gem Consolidated property with the Tenabo Consolidated properties. My recollection serves me that I was in New York City in July or August of 1908, stopping at the Imperial Hotel, and Mr. Locker was there, trying to promote the sale of the stock of—I think he called it the Tenabo Consolidated Mines Company. [163] which consolidated the Two Widows group and a lease upon the Phoenix, and I was pretty well acquainted with the ground in as much as I had been over it, and he stated to me that he had several people that were interested in buying some of the stock, and he wanted me to go with him and meet them. After visiting these people with Mr. Locker, I stated to him that it was apparent to me that the development of this mining property was not sufficient to interest the people that I had been talking to with him. Mr.

(Testimony of H. C. Edwards.)

Tyree, in the course of a few days, in conversation with him, stated that he had been absolutely unable to flood any of the stock of what was then the Gem Consolidated Company, and I stated to Mr. Tyree at that time that I believed that Mr. Locker was in touch with some people with whom they could finance a company, provided the two companies were consolidated, and shortly after that, there were several conversations along that line. Shortly afterwards, I returned to Salt Lake City, and Mr. McCornick instructed me to bring a suit to foreclose the mortgage that was against the Gem property, and Mr. Tyree and Mr. Locker, as I remember it, came to Salt Lake and entered into negotiations for the purpose of consolidating the two properties. Mr. McCornick was crowding his foreclosure suit along, and it was finally agreed that if these people would finish up their consolidation and give Mr. McCornick reasonable assurance that they could finance the company, that he would forbear the immediate taking of a decree in that suit.

Defendant's Exhibit "J" is a promissory note, which was secured by a mortgage upon the Gem Mining Claim, and foreclosure proceedings were commenced on that mortgage by McCornick & Company, and my recollection is I represented him as an attorney.

Defendant's Exhibit "K" is a statement which I made to Mr. McCornick, showing amount of fee which I was willing to take in the foreclosure proceedings if it proceeded no further, and also the items of expense which I had advanced in the **filing** of the suit.

(Testimony of H. C. Edwards.)

That bill was sent to Mr. W. S. McCornick. It was paid after the money was received from the sale of a big block of stock. I think it was 165,000 shares of stock by the reorganized company—that is, the Tenabo Milling & Smelting Company—and Mr. McCornick called on me to tell him what my charge against him would be, and when it [164] was given to him, both my bill and the amount due for principal and interest upon the note and mortgage and the costs were submitted to the Tenabo Milling & Smelting Company, and my recollection is that two separate checks were issued by the defendant, one to Mr. McCornick and one to me. I am the H. C. Edwards who was a member of the board of directors. As to the services the directors rendered, we held a number of formal meetings and we held a great many informal meetings, discussing the affairs of the corporation. As to the value of our services, mine may not have been of but little value as an ultimate result obtained for the corporation, but my services rendered were far in excess of \$50.00 per month, because I know that there was no month when we did not spend more than a day in the consideration of the business of the company, and my time was worth a great deal more than I received from the company. I received nothing from the company for the services which I performed as director. However, there was a resolution passed which authorized the payment to me of \$50.00 per month, but I waived that when I found that the finances of the company were not being

(Testimony of H. C. Edwards.)

put in shape as rapidly as I would like to have seen them.

Cross-examination.

Some of the services I rendered were embodied in the minutes of the corporation. Many, many meetings discussing the subject matter of the minutes were held, and the minutes only incorporated the ultimate acts of the board of directors. We held several meetings, devising ways and means for doing assessment work. My recollection is that we were without funds at that time, but I could not say how many. Another item was considering contracts that were presented, applications for contracts by various parties desiring to sell the stock. As I recollect, the first application was made by Mr. Locker. That consumed a great deal of time in discussion. I cannot say how much time was consumed with him. We had various meetings on the subject, and they would run from four o'clock, a great many times, until past six o'clock, the subject matter discussed was the matter with Mr. Locker, and what would be best calculated to fund the treasury of the corporation. My best recollection is that we had two or three meetings to discuss the Locker contract. They consumed from four to six o'clock, and then we entered into the contract. [165]

When I spoke of several applications having been made for the sale of stock, I referred to the several Locker contracts. Others had been applied for by Mr. Locker, one in 1908 or 1909 for the sale of stock in France. I do not think of any other now.

Then there was an effort made down in New York

(Testimony of H. C. Edwards.)

to put this stock on the curb, and communications came to the company from various sources, and that resulted in a number of meetings, and the subject matter of it, and all papers they wanted signed and a lot of things of that kind.

In connection with the foreclosure of the McCornick mortgage, the services rendered were the bringing of the foreclosure proceedings, and a campaign for some time, trying to get these people to pay the thing. I stated to Mr. McCornick that I was willing to accept the sum of \$1,000.00 and he agreed to that, and in the negotiations, it was paid by the defendant company. (The record of the foreclosure proceedings above mentioned is marked Defendant's Exhibit "M" and admitted in evidence.)

Redirect Examination.

I had the contract respecting the attorney's fee with Mr. McCornick prior to the organization of this corporation defendant. The agreement was that I was to have the attorney's fees, which was given by the Court on the foreclosure proceedings, and there was—my recollection is—a ten per centum attorney's fee prayed for in the complaint. I think the suit was held off at the request of Mr. Tyree, and the organization of the Tenabo Milling & Smelting Company. There was later an arrangement between me and Mr. McCornick with reference to the attorney's fee in the event that it did not come to a decree, and that was \$1,000.00.